

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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KARS 4 KIDS INC.,

Plaintiff,

v.

AMERICA CAN!,

Defendant.

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Civil Action No. 14-7770 (PGS/LHG)

**DECLARATION OF BRIGGS M.  
WRIGHT IN SUPPORT OF  
PLAINTIFF KARS 4 KIDS INC.'S  
MOTION *IN LIMINE* NO. 1 TO  
EXCLUDE THE ENTIRETY OF  
BRYCE R. COOK'S OPINIONS**

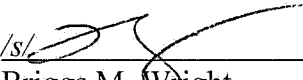
*Redacted Version*

I declare as follows:

1. I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, and counsel of record for Plaintiff Kars 4 Kids Inc. ("Kars 4 Kids"). I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.
2. Attached hereto as **Exhibit 1** is a true and correct copy of the opening expert report of Defendant America Can!'s ("America Can") damages expert witness Bryce R. Cook, dated January 16, 2018.
3. Attached hereto as **Exhibit 2** is a true and correct copy of the reply expert report of America Can's damages expert witness Bryce R. Cook, dated March 1, 2018.
4. Attached hereto as **Exhibit 3** is a true and correct copy of excerpts from the transcript of the deposition of America Can's damages expert witness Bryce R. Cook, dated March 15, 2018.

I hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed in New York, NY on February 14th, 2019.

  
\_\_\_\_\_  
Briggs M. Wright

# **EXHIBIT 1**



**Kars 4 Kids Inc.**

**v.**

**America Can!**

United States District Court, District of New Jersey  
Case No. 3:14-cv-07770-PGS-LHG

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January 16, 2018

**Expert Report of  
Bryce R. Cook**

**Highly Confidential – Outside Attorneys Only**

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**EXPERT REPORT**

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## EXPERT REPORT

### **I. Introduction**

Navigant Consulting was retained by counsel for America Can! to determine the damages or monetary remedy resulting from the infringement of the "Cars for Kids" trademark by Kars for Kids Inc. ("K4K").

In developing my opinions, I have reviewed the pleadings filed in this matter, documents produced by the Plaintiff, and documents obtained in the course of performing my research and analysis. A list of the documents I considered is included in Attachment A.

The opinions and analyses presented in this report are based on currently available information. If new information becomes available that is relevant to my analysis or opinions, I may supplement this report. If this matter proceeds to trial, selected pages of the documents and information considered may be used as exhibits. In addition, I may prepare graphical or illustrative exhibits based on the contents of this report, the documents and information considered, and on my analysis of the documents and information.

I am a Director with Navigant, a specialized independent consulting firm that employs over 5,000 professionals and has over 60 offices worldwide. The firm's consultants include accounting, finance, engineering and information technology professionals experienced in the analysis of business operations, business valuation, financial and accounting matters, and economic damages. I have a Bachelor of Science Degree in Business Management with a concentration in finance and a Master's Degree in Business Administration. I am also a Certified Management Accountant and a member of the National Association of Certified Valuation Analysts.

I am experienced in financial, economic, damage and accounting matters related to the scope of work on this matter. I have consulted and testified on numerous engagements involving the analysis of economic damage claims, including matters involving trademark infringement and valuation of intellectual assets. My résumé is included as Attachment B and includes a list of the cases in which I have provided expert testimony. My billing rate on this matter is \$445 per hour.

### **II. Background**

#### **A. America Can! Cars for Kids**

America Can! is a not-for-profit Texas corporation formed in 1988 that operates Dallas Can! Academy and various other charter schools in Texas. Dallas Can!, was formed in 1985 to aid adjudicated juveniles and later expanded to serve at-risk youth through various educational and training programs. In 1996 Dallas Can! opened its first charter school in Dallas and subsequently expanded to open additional charter schools throughout Texas and in other states.<sup>1</sup>

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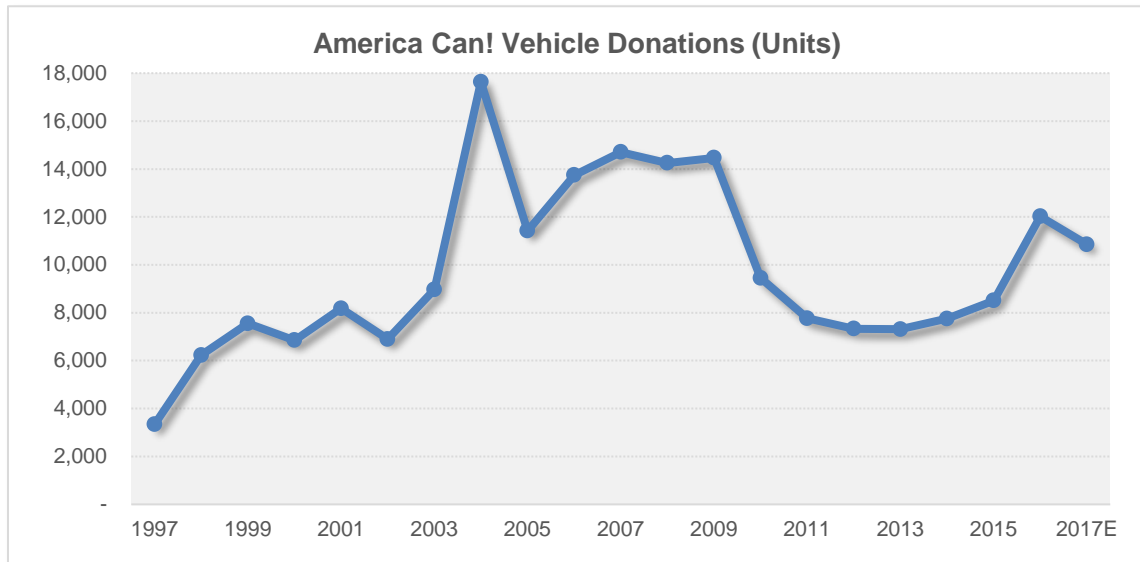
<sup>1</sup> America Can! 2009 audited financial statements, Note 1; also, <https://www.texanscan.org/about-our-story/>



## EXPERT REPORT

Beginning in 1989, America Can! took steps to promote its automobile and watercraft resale program and boost its charitable fundraising activities through use of the assumed names Cars for Kids and Kars for Kids. Since at least 1989, America Can! has continuously and consistently used its Cars For Kids Mark (the “Mark”) in interstate commerce and in connection with its charitable fund raising services.<sup>2</sup> America Can! Cars for Kids (“CFK”) was formed in 1992 as the fundraising arm of the charter-holding organization, owning and operating the car donation and auction program that America Can! started in 1989.<sup>3</sup>

CFK accepts donations in every state but the majority of its donations and sales have been in Texas. CFK’s vehicle donations peaked in 2004 and have generally trended downward since then, as shown in the following chart.<sup>4</sup>



As shown above, CFK’s donations declined sharply in 2005, partially rebounded in 2006 through 2009, then declined sharply again in 2010 where they remained at low levels for the next five years until experiencing a strong uptick in growth in 2016. The 2010 decline and depressed donation levels reflect, in part, the effects of the recession and increased value of used cars.<sup>5</sup> However, as will be shown in the following section, K4K’s market entry and growth in each of

<sup>2</sup> Answer and Counterclaim, p. 17.

<sup>3</sup> America Can! Cars for Kids 2016 audited financial statements, Note 1; <http://www.americacan.org/aboutus.asp>; Answer and Counterclaim, p. 17.

<sup>4</sup> Source: “CFK Sales 2004 – 2017.xls” and “Old Database Records.xls.” 2017 estimated by applying previous 3-year Jan-Aug units as a percent of total (62.6%) to Jan-Aug 2017 units.

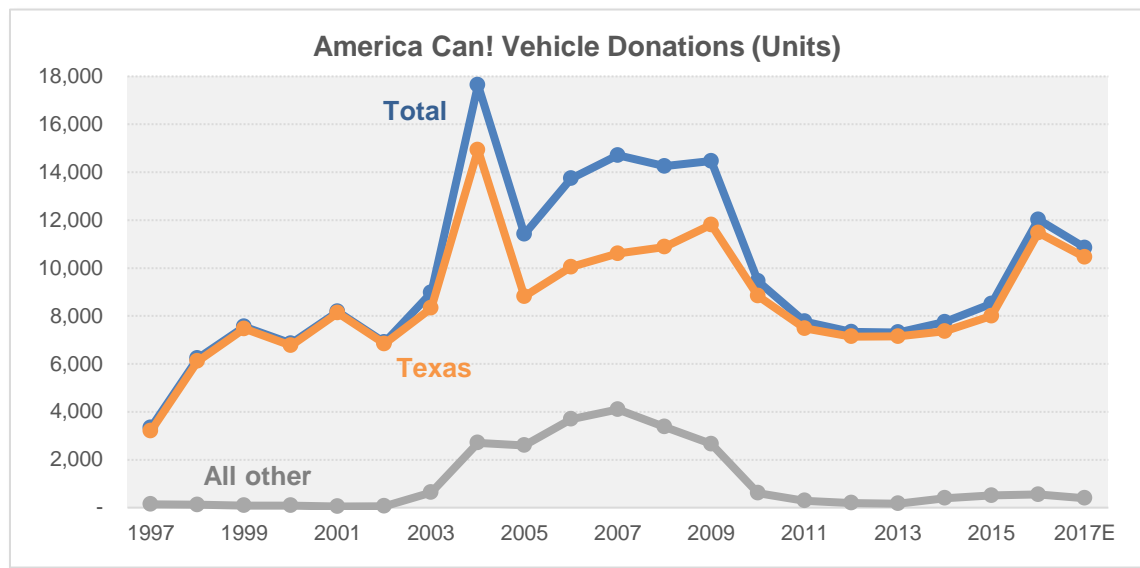
<sup>5</sup> <https://www.thoughtco.com/used-car-sales-figures-3308387> “Over the three calendar years from 2009 to 2012, used car sales would jump more than 14%. The recession hadn’t quite ended for a good portion of that time but people turned to used cars instead of buying new cars because of the better values, better vehicles, and strong certified pre-owned programs.”



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CFK's markets, along with its high advertising spend, likely had an effect on CFK's donations and inability to return to previous levels.

CFK's decline in donations was more pronounced in states outside of Texas, as illustrated in the following chart.<sup>6</sup>



As shown above, after the sharp one-year decline in 2005, Texas donations began increasing through 2009. Out-of-state donations – reflected in the gap between the Texas and Total lines and in the “All other” line – were also growing in these early years, and at a faster rate than Texas through 2007. However, out-of-state donations started declining in 2008, and after the 2010 drop almost disappeared entirely. After peaking above the 4,000-unit level in 2007, CFK's nationwide out-of-state donations declined to a level of only several hundred units, a fraction of its pre-2010 levels, and have not rebounded. As described in the next section, this decline corresponds with K4K's growth in the same non-Texas markets.

America Can! has expended significant resources in marketing and advertising to promote its CARS FOR KIDS Mark and the underlying automobile and watercraft donation program including, but not limited to, print and broadcast advertising, billboards, door hangings, and other publicity methods.<sup>7</sup> The following table summarizes the advertising and promotion expense CFK has expended from 2008 through 2014.

<sup>6</sup> Source: “CFK Sales 2004 – 2017.xls” and “Old Database Records.xls.” 2017 estimated by applying previous 3-year Jan-Aug units as a percent of total (62.6%) to Jan-Aug 2017 units.

<sup>7</sup> Answer and Counterclaim, p. 17.



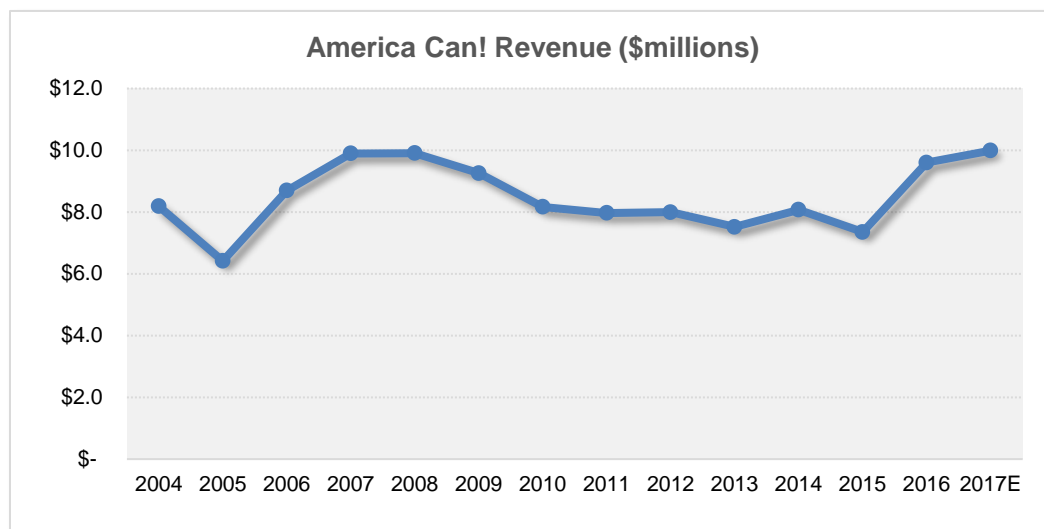


## EXPERT REPORT

**Table 1 – America Can! Advertising expense<sup>8</sup>**

2008	\$ 4,292,981
2009	3,136,594
2010	2,667,363
2011	3,568,832
2012	3,246,242
2013	2,761,304
2014	2,301,967
<b>Total</b>	<b>\$ 21,975,283</b>

For its Texas vehicle donation program, CFK handles vehicle intake, title work, inspection, mechanical repair (if needed) and the auction process. For donations outside of Texas, CFK outsources these activities to Copart. CFK's annual auction and sales revenue from its vehicle donation operation have generally been in the range of \$8 million to \$10 million, as shown in the chart below.<sup>9</sup>



CFK's auction and sales revenue did not decline to the same degree as donation units in 2010 and following years because CFK realized a much lower auction/sales price on donated vehicles outside of Texas than on vehicles within Texas.<sup>10</sup> Therefore, with the loss of out-of-state donations, its average auction/sales price per vehicle increased, thereby providing some offset to the donations lost during that period.

<sup>8</sup> Source: America Can! Form 990's

<sup>9</sup> Source: "CFK Sales 2004 – 2017.xls" and "Old Database Records.xls." 2017 estimated by applying previous 3-year Jan-Aug sales as a percent of total (62.6%) to Jan-Aug 2017 sales.

<sup>10</sup> Some of the lower price is due to the \$129 fee Copart deducts for handling the intake and auction activities; however, this fee only accounts for about half the difference.



## EXPERT REPORT

### B. Kars 4 Kids

K4K is a national organization dedicated to addressing the educational, material, emotional and spiritual needs of disadvantaged Jewish children and their families. K4K is a registered national, 501(c)(3), non-profit organization, which was established in 2000.<sup>11</sup>

K4K claims to have begun using the KARS 4 KIDS marks “since at least 1998” but did not obtain a trademark registration until much later. It was unsuccessful in registering the KARS 4 KIDS mark but was able register 1-877-KARS-4-KIDS in April 2012.<sup>12</sup> In addition, K4K claims to have offered a website located at [www.kars4kids.com](http://www.kars4kids.com) since 2002.<sup>13</sup> In or about August of 2003, America Can! learned of K4K’s use of the phrase “Kars 4 Kids” in connection with its automobile donation program through an advertisement that appeared in the Dallas Morning News. Because K4K’s use of the phrase “Kars 4 Kids” was phonetically identical to America Can!’s CARS FOR KIDS Mark and because both entities appeared to be operating similar automobile donation programs aimed at the same channels of commerce, America Can! sent a Cease and Desist Letter to K4K in August 2003.<sup>14</sup>

America Can! believes that K4K ceased using the “Kars 4 Kids” phrase in America Can!’s home state of Texas following the Cease and Desist Letter; however, K4K has continued to use the phrase in its advertising outside of Texas. As shown in the following table, K4K appears to have significantly outspent CFK in advertising in every year since at least 2008.

Table 2 – Comparison of Advertising Expense <sup>15</sup>		
	K4K	CFK
2004		N/A
2005		N/A
2006		N/A
2007		N/A
2008		\$ 4,292,981
2009		3,136,594
2010		2,667,363
2011		3,568,832
2012		3,246,242
2013		2,761,304
2014		2,301,967
<b>2008-2014 Total</b>		<b>\$ 21,975,283</b>
<b>All years</b>		<b>\$ 21,975,283</b>

<sup>11</sup> <https://www.kars4kids.org/joy.php>; JOY audited 2010 financial statement, Note 1; 2013 Form 990 for JOY.

<sup>12</sup> Complaint, p. 4; Answer and Counterclaim, pp. 19-20

<sup>13</sup> Per the Internet Archive Wayback Machine, October 2002 is the earliest capture of [kars4kids.org](http://kars4kids.org).

<sup>14</sup> Answer and Counterclaim, pp. 18-19.

<sup>15</sup> Sources: K4K0085313.xls, America Can! Form 990's



# EXPERT REPORT

Even though CFK began using the Mark first and preceded K4K in most states (based on when an organization first reported donations), after K4K entered each market, it soon surpassed CFK in donations by a large margin, with the exception of CFK's home state of Texas, as shown in the following table.

Table 3 – Analysis of Market Entry <sup>16</sup>						
State	First in Market	Entry Year <sup>17</sup>		Year K4K <sup>18</sup> Surpassed CFK	2004 Donations	
		CFK	K4K		CFK	K4K
NJ	CFK	1997			179	
MD	CFK	1996			96	
NY	CFK	1996			216	
PA	CFK	1995			70	
CT	CFK	1997			56	
OH	CFK	1996			36	
MA	CFK	1998			103	
CA	CFK	1995			648	
IL	CFK	1996			199	
FL	CFK	1996			92	
VA	CFK	1996			64	
WA	CFK	1998			81	
WI	CFK	1997			56	
MI	CFK	1995			101	
MN	CFK	1996			83	
GA	CFK	1996			88	
IN	CFK	1997			26	
AZ	CFK	1995			30	
NC	CFK	2002			40	
CO	CFK	1997			18	
OR	CFK	1996			35	
MO	CFK	1995			34	
NH	CFK	2001			18	
UT	CFK	2002			24	
NV	CFK	2001			9	
TN	CFK	1997			40	
DE	CFK	1997			7	
ME	CFK	1997			5	
DC	CFK	1999			8	
KY	CFK	1997			10	
SC	CFK	1997			8	
KS	CFK	1996			18	

<sup>16</sup> Sources: CFK Data - CFK Sales 2004 – 2017.xls and Old Database Records.xls, K4K Data – K4K0000089.xls, K4K0000090.xls, and K4K0000095.xls.

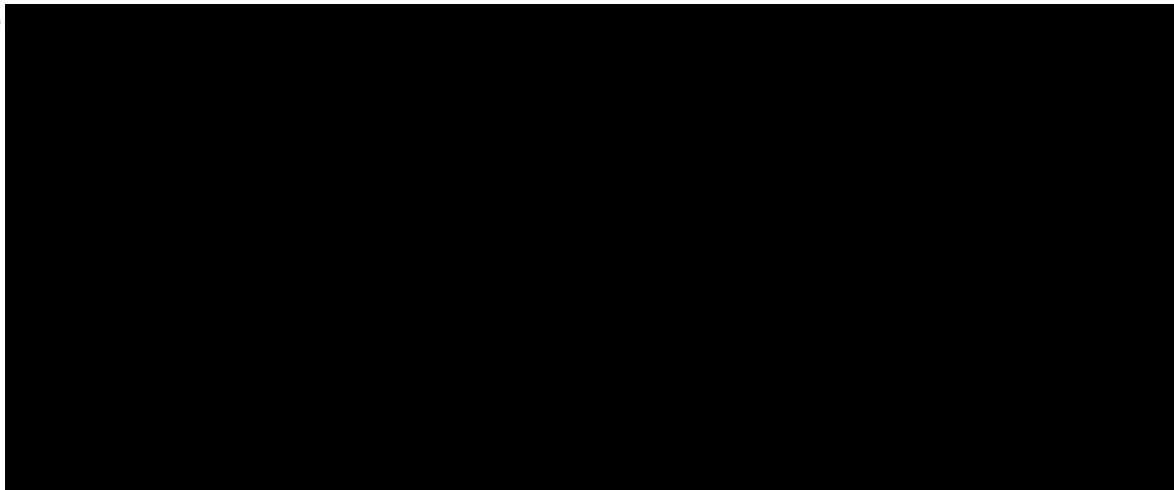
<sup>17</sup> Based on month and year donations were first reported in each party's donations database files. Earliest available data for CFK is 1995 and for K4K is 1999.

<sup>18</sup> Based on cumulative donations received since first year in a given market.


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Table 3 – Analysis of Market Entry <sup>16</sup>						
State	First in Market	Entry Year <sup>17</sup>		Year K4K <sup>18</sup> Surpassed CFK	2004 Donations	
		CFK	K4K		CFK	K4K
IA	CFK	1997			12	
AL	CFK	1998			18	
LA	CFK	1995			16	
NM	CFK	1998			6	
NE	CFK	1996			7	
MS	CFK	1996			10	
AR	CFK	1996			8	
MT	CFK	1997			2	
OK	CFK	1996			35	
TX	CFK	1995			14,812	
RI	K4K	2003			14	
VT	K4K	2003			3	
WV	K4K	2004			6	
ID	K4K	2004			5	
HI	K4K	2003			14	
WY	K4K	1995			1	
ND	K4K	2002			0	
AK	K4K	2004			1	
SD	K4K	2004			2	

As shown above, CFK preceded K4K in all but nine states; yet K4K overtook CFK's donations in most states by 2003 or 2004. The following chart shows each organization's total donations over time.<sup>19</sup>



<sup>19</sup> Chart source: K4K0089669.xls and KFK Form 990's. Full-year 2015 and 2016 K4K donation data was not available; therefore, the number of units in those years was estimated based on the reported Form 990 non-cash donation revenue divided by 2014 average revenue per vehicle.



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K4K's donations followed a similar pattern as CFK with a peak in 2009 followed by declining donations in 2010 through 2012, which indicates the recession and used-car market had a similar effect on both companies. However, K4K's donations recovered much more quickly than CFK's, which did not experience an increase until 2016. CFK's slower recovery and inability to regain its past level of donations appears to be due to K4K's comparatively high advertising spend and significant donation growth in each location it entered.

Given the similarity of each organization's mission and car donation program – vehicle donations to benefit underprivileged kids; advertising via internet, radio and print; solicitation of donations in all 50 states – there is likely to be consumer confusion based on the similarity of the marks used by each organization. Indeed, I found evidence of consumer confusion in many of the donor comments contained in various K4K documents, including the K4K donations database, two instances of which are as follows:<sup>20</sup>

- “Confused with Cars for Kids.”
- “Was picked up by Copart for Cars for Kids, not us.”

### III. Damages / Monetary Remedy

Under the Lanham Act, recovery for trademark infringement may include:

(1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount.<sup>21</sup>

#### A. K4K's Profits

As a 501(c)(3) non-profit entity, K4K is required to file annual statements (form 990) of income and expense with the IRS. From K4K's annual form 990's, I was able to obtain the revenue it earned from its vehicle donation operation over the last ten years. I compared the Form 990 revenue amounts to the auction sales revenue from the K4K database and to the revenue reported in the JOY For Our Youth 2010 audited financial statement (the only audited statement available).

Note 1 to this audited financial statement includes the following explanations regarding donations and revenue: “Donations of used cars, which account for substantially all of the organizations' revenue, are valued at the net proceeds of subsequent sales of such vehicles. The value of other

<sup>20</sup> Source: K4K0000090.xls. See also, 04\_K4K0527662\_image through 60\_K4K0532002\_image.

<sup>21</sup> 15 U.S. Code § 1117 - Recovery for violation of rights



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donated goods and services are not reflected in the financial statements... The organizations' primary source of revenue is derived from donations of used vehicles, which are sold at auction by independent car dealers." This note indicates that (1) substantially all of the revenue relates to its car donation program, and (2) reported revenue is net of the fees K4K pays the independent dealers who auction the cars and therefore reflects "net proceeds" to K4K. These results are summarized below.

Table 4 – K4K Revenue from Vehicle Donations			
Year	Form 990	Database	Audited
2008	\$ 23,003,060		\$ 29,130,893
2009	24,653,912		
2010	29,130,893		
2011	29,976,125		
2012	26,964,821		
2013	28,229,162		
2014	34,756,266		
2015	39,071,455		
2016	44,383,024		
2017 <sup>22</sup>	48,007,066		
<b>Total</b>	<b>\$ 328,175,784</b>		

Based on the above summary of revenue, America Can!'s claim for K4K's profits on sales made using the infringing mark total **\$328,175,784**.

### B. Actual Damages

America Can! believes that K4K's confusingly similar Mark has caused confusion in the marketplace and resulted in CFK losing donations. At this time, I am not able to determine the amount of lost donations attributable to K4K's infringement. However, there are other methods that have been accepted as measures of damages that may be useful to the trier of fact.

#### ***Reasonable Royalty***

One such method is the royalty that K4K would have had to pay if CFK had agreed to license the Mark. However, given that both organizations compete directly for the same donations in the same markets, CFK would be unwilling to license the Mark for anything less than the incremental profit it earns on its donations. Nevertheless, in a hypothetical negotiation, as is used in determining reasonable royalties in patent matters, the assumption is that the parties would reach an agreement as opposed to the defendant infringing or leaving the market altogether. In this matter neither party has licensed its trademarks, and I have not found any reasonably-comparable

<sup>22</sup> 2017 revenue estimated by applying latest 5-year (2011-2016) CAGR (8.2%) to 2016 revenue





## EXPERT REPORT

third-party license agreements. Therefore, the best approach for determining a reasonable royalty would be to determine a split of K4K's incremental profit on infringing donations based on a Georgia-Pacific-type analysis. However, because K4K has not produced detailed information on its expenses, I am unable to perform the analysis to determine incremental profit. Assuming K4K produces sufficiently detailed expense information in its rebuttal report, I may be able to use that information to assess incremental profit and a reasonable royalty.













































































### ***Corrective Advertising***

As shown in Table 2 above, K4K has spent over \$75 million in advertising that wrongfully used the Mark from 2004 through 2014 (the last full year available). One measure of damages could include the cost of corrective advertising America Can! would have to do to counter the \$75 million in advertising K4K has done. At this time, I do not have an estimate of what amount of corrective advertising would be necessary to correct the confusion that has resulted in the marketplace; however, the trier of fact may find the total advertising spend useful as a starting point for addressing this method.

A handwritten signature in black ink, appearing to read "Bryce R. Cook", written over a horizontal line.

Bryce R. Cook


























































































































**Attachment A**






 CAN-00000355_Highly Confidential-Outside Counsel Only (2)-C3	 oorah_2010_irs_990
 CAN-00000001_Highly Confidential-Outside Counsel Only (4)-C3	 oorah_2008_irs_990
 CAN-00000002_Highly Confidential-Outside Counsel Only (3)-C3	 oorah_2005_irs_990
 Old Database Records	 oorah_2004_irs_990
 2017 to Current Donation Sales	 oorah_2002_irs_990
 Form 990-2000-America CAN	 k4k 990 2008-1
 Form 990-2001-America CAN	 k4k 990 2002
 Form 990-2002-America CAN	 k4k 990 2003
 Form 990-2010-America CAN	 k4k 990 2004
 Form 990-2012-America Can	 k4k 990 2005
 Form 990-2013-Cars for Kids	 k4k 990 2006
 52729548_1_AMC00526842 - Financials for Board	 k4k 990 2007
 CAN Audited Financials FY 2014	 1_K4K0135992_image (JOY audited 2010 FS)
 Financial Audit 2015	 k4k Clearing House Enterprise
 Cars for Kids Final 2016 Report	 Joy For Our Youth
 America Can! Financial Audit 2013	 Esti Landu
 America CAN Financial Audit 2012	 oorah_2015_irs_990
 America CAN Financial Audit 2011	 oorah_2014_irs_990
 America CAN Financial Audit 2010	 oorah_2013_irs_990
 America CAN Financial Audit 2009	 oorah_2012_irs_990
 CFK Sales 2004 - 2017	 oorah_2011_irs_990
 Form 990-2014-America Can	 oorah_2009_irs_990
 Form 990-2013-America Can	 oorah_2007_irs_990
 Form 990-2011-America CAN	 oorah_2006_irs_990
 Form 990-2008-America CAN	 oorah_2003_irs_990
 CAN 990 - FY2015	 k4k_990_2013
 Form 990-2007-America CAN	 k4k 990 2008
 Form 990-2006-America CAN	 k4k 990 2015
 Form 990-2005-America CAN	 k4k 990 2016
 Form 990-2004-America CAN	 k4k 990 2014
 CAN 990 - FY2012	 k4k 990 2013
 CAN 990 - FY2010	 k4k 990 2012
 CAN 990 - FY2009	 k4k 990 2011
 AC response to K4K Settlement Ltr to Judge	 k4k 990 2010
 Aug 2003 Cease Desist Ltr	 k4k 990 2009
 Joy for our Youth Financials	
 K4K -- Esti (Financials)	
 K4K - Joy for our Youth	
 K4K - Settlement talks	
 K4K - TV income & expenses	
 K4K Settlement Ltr to Judge	



K4K0000089	K4K0044384	K4K0084573	K4K0087617	K4K0110692	K4K0141109	K4K0531663	K4K0556985
K4K0000090	K4K0044385	K4K0084574	K4K0087649	K4K0110791	K4K0526353	K4K0532168	K4K0556986
K4K0000091	K4K0047045	K4K0085273	K4K0088116	K4K0110892	K4K0526408	K4K0532265	K4K0556987
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K4K0000094	K4K0052423	K4K0085313	K4K0088724	K4K0111208	K4K0526500	K4K0532360	K4K0557793
K4K0000095	K4K0052831	K4K0085342	K4K0088901	K4K0111217	K4K0526758	K4K0532996	K4K0557800
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K4K0000277	K4K0055054	K4K0085861	K4K0089594	K4K0113031	K4K0527344	K4K0534156	
K4K0000979	K4K0060375	K4K0085862	K4K0089597	K4K0113032	K4K0527345	K4K0534168	
K4K0000980	K4K0060385	K4K0085863	K4K0089625	K4K0113033	K4K0527346	K4K0534172	
K4K0020066	K4K0060415	K4K0085932	K4K0089656	K4K0113177	K4K0527347	K4K0534527	
K4K0020158	K4K0060416	K4K0086101	K4K0089659	K4K0113210	K4K0527348	K4K0534530	
K4K0023276	K4K0061022	K4K0086102	K4K0089669	K4K0113291	K4K0527349	K4K0534697	
K4K0036936	K4K0061144	K4K0086103	K4K0089670	K4K0113419	K4K0527350	K4K0534960	
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-  28454510\_1\_2014 KAR 4 KIDS v. AMERICA CAN! COMPLAINT AND COVER SHEET-C1 - Copy
-  28454510\_1\_2014 KAR 4 KIDS v. AMERICA CAN! COMPLAINT AND COVER SHEET-C1
-  28926676\_1\_2015 0205 ANSWER to Complaint , COUNTERCLAIM against All Plai...-C1
-  29224969\_1\_2015 0302 ANSWER to Counterclaim by KARS 4 KIDS (#26)-C1
-  51292213\_1\_2017 1006 CONSENT ORDER (#99)-C1



**Bryce R. Cook**

## Bryce R. Cook

Bryce R. Cook  
Director

**Navigant Consulting**  
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Phoenix, AZ 85004-2245  
Tel: 602.528.8061 (direct)  
Fax: 602.254.6163  
bcook@navigantconsulting.com

### Professional History

- Navigant Consulting, Inc. – Present
- Tucker Alan Inc. – 1994 to 2004
- Peterson Consulting Limited Partnership – 1987-1994
- Economic Analysis Corporation – 1986-1987

### Education

- Master of Business Administration, with a concentration in finance and economics, Arizona State University
- Bachelor of Science degree in Business Management, Brigham Young University
- Certified Management Accountant

### Professional Associations

- Institute of Management Accountants
- National Association of Certified Valuation Analysts
- Licensing Executives Society
- State Bar of Arizona, Intellectual Property Section

### Current Position

Bryce is a Director with Navigant Consulting, Inc. As part of Navigant's Litigation and Investigations practice, Bryce consults on business matters involving complex financial, accounting and economic issues, particularly as they relate to economic damages or financial investigations. Bryce is a Certified Management Accountant and a member of the National Association of Certified Valuation Analysts.

### Professional Experience

Bryce has extensive experience in matters involving computation of economic damages, including breach of contract, infringement of intellectual property rights, professional malpractice, fraud and other causes of action. He has performed damage analyses that involve lost profits, increased costs, diminution of business value and deepening insolvency, among others. He has consulted in a variety of industries including:

- Financial institutions
- Healthcare/pharmaceutical
- Retail
- Utilities
- Real estate and construction
- Insurance
- Computers
- Automobile
- Restaurant and fast food
- Agricultural
- Oil and gas

Bryce has given expert testimony on damages in federal and state courts and in arbitration. He has lectured to the Arizona State Bar on damages issues and has made presentations on damages to law firms and at professional society conferences.





## Attachment B

Bryce R. Cook

### Selected Experience

#### Financial Analysis and Commercial Damages

Performed analyses of economic damages and other special-purpose financial investigations of companies in a variety of industries. Damages were based on such causes of action as breach of contract, dealer termination, professional malpractice, lender liability and deepening insolvency, to name a few. Case examples include:

- » Evaluated numerous auditor malpractice claims brought by trustees, investors, government agencies and other third parties. Performed forensic analysis to determine the causes of a company's failure or reasons for the decline in value of its securities. Analyzed the company's investments and transactions over time to determine what would have been avoided given the plaintiff's liability scenario.
- » Evaluated a real estate developer's lost profit claim stemming from the filing of a lis pendens on one of his properties. Analyzed property values and economic indicators affecting Arizona real estate over the relevant time period. Modeled cash flow projections and performed sensitivity analysis under varying marketing and economic scenarios to determine the most likely disposition of his property holdings.
- » Determined consequential damages to high-tech manufacturing company stemming from insurance company's failure to pay on a claim. Damages included lost profits and lost cost savings due to inability to take advantage of business opportunities.
- » Reconstructed the capital accounts of a dissolved physicians practice to determine the ending capital owed to/by the various partners based on a review and analysis of five years worth of transactions records, accounting data and tax records. This analysis included determining the relative value of services provided, real estate contributed, and other resources contributed or used that flowed through the partnership over this time period.

#### Valuation

Performed business valuations for purposes of damage claims, solvency analyses and transaction disputes. Valuations have included public and privately held companies, franchises, trademarks and loan portfolios. Case examples include:

- » Valued a sub-prime mortgage wholesaler whose general partner terminated the partnership. Entailed analyzing the company's past performance, management skill, and industry norms. Performed projections of loan production volume, origination points and fees, sales premiums, and general and administrative expenses.
- » Valued the trademark of a restaurant chain that was licensed to operators in Arizona and California. Analyzed factors that affected the ability of the mark to generate income, including recognition and reputation, historical financial performance, legal status, licensee characteristics and economic/industry conditions.



## Attachment B

### Bryce R. Cook

- » Performed a valuation estimate of the lease price of a lithotripsy facility operated by a physician's group. The lease structure included compensation for both equipment and services provided by the physicians. Work involved researching comparable companies, fee and cost structures, revenue per patient and contractual agreements with hospitals.
- » Performed stock valuation of a closely held manufacturing firm being sued by a minority shareholder wanting to liquidate his interest. Determined discounts for lack of marketability and lack of control.

### Intellectual Property

Performed damage analyses stemming from infringement of intellectual property rights. This work has included determining lost profits, reasonable royalty, accounting of profits and deductible costs, and the cost of corrective advertising. Case examples include:

- » Analyzed a company's damage claim stemming from the alleged misappropriation of its trade secrets and proprietary technology relating to a medical waste destruction process. In assessing the value of the trade secrets, performed research on the industry and commercial viability of the technology. Evaluated the company's past transactions involving the technology and determined a reasonable royalty assuming a hypothetical licensing negotiation between the parties.
- » Calculated a reasonable royalty and the economic harm sustained by a patentee whose patent was infringed by a tool manufacturer and distributor. Analyzed various factors relevant to determining a reasonable royalty in this matter, including the bargaining positions and economic expectations of both parties prior to the infringement.
- » Performed an analysis of a trademark infringer's accounting records to determine its costs associated with manufacturing and selling counterfeit branded motorcycles. Evaluated infringer's own analysis of costs and identified inconsistencies and errors.
- » Analyzed the lost profits of an international tour operator due to a competitor's trademark infringement and false advertising. Performed a detailed analysis of economic, industry and company-specific factors to determine to what extent, if any, these factors contributed to the decline in the infringed company's profits. Conducted extensive interviews of travel agents to determine the likelihood of consumer confusion in the industry and the effect of the advertising claims on consumers.

### Healthcare

Performed various analyses of healthcare provider financial operations, rate structures, profitability and costs of providing services. Have performed work on behalf of state agencies, hospitals and physicians. Case examples include:

- » Performed a variety of consulting projects for the State of California, Department of Corrections, relating to inmate healthcare. One project entailed analyzing a provider hospital's cost structure, profitability and financial condition in a rate dispute. In another project, computed statistics from health-care budgeting and expenditure data and compared results with other state departments of corrections.



## Attachment B

### Bryce R. Cook

- » Analyzed the financial operations and patient volume of a laser eye clinic to determine the costs and profits associated with treating the former patients of a large, national laser eye surgery company that went bankrupt. Analyzed the accounting records of a related, surviving clinic to determine the ownership of accounts and moneys owed between the two entities.
- » Analyzed adequacy of Medicaid reimbursements to health-care providers in a lawsuit against the state of Oregon. Conducted review of providers' costs and constructed a computer model to analyze variables affecting reimbursement formula.
- » Prepared a Boren Amendment "findings" report and analysis to determine adequacy of Medicaid reimbursement of hospital costs in the state of Illinois. Required significant statistical and quantitative analysis of hospital costs.
- » Reviewed lost profit claim of the operator of a planned medical clinic in a lender liability lawsuit. Created a financial model to generate alternative business scenarios based on claimant's historical financial record operating similar ventures.

### Testimony History

*American Tech Services, Inc. v. Raytheon Service Company, et al.*

U.S. District Court, Phoenix, AZ

- Deposition: January 1997
- Trial: May 1997

*Lamb Architects & Associates, Inc. v. Wingate Inns L.P.*

American Arbitration Association, Phoenix, AZ

- Deposition: September 1997
- Arbitration: September 1997

*H-D Michigan, Inc. (Harley Davidson) v. Bikers Dream, Inc., et al.*

U.S. District Court, Los Angeles, CA, 1998

- Declaration: April 1998

*Process Construction, Inc. v. The Tartaric Manufacturing Corporation, et al.*

Superior Court of California, Stanislaus County

- Deposition: May 1999
- Deposition: August 1999

*Robert Smith v. Casa Grande/I-10 Land Partners Joint Venture II, et al.*

Superior Court of Arizona, Maricopa County

- Declaration: September 1999
- Deposition: July 2001
- Trial: October 2001

*Leasco, Inc., Debtor v. Santo Domingo & Company, Inc., et al.*

U.S. Bankruptcy Court, Phoenix, AZ

- Deposition: May 2004
- Trial: June 2004





## Attachment B

### Bryce R. Cook

*Next Phase Enterprises v. Action Performance Companies*

Superior Court of Arizona, Maricopa County

- Deposition: July 2007

*Snikpoh Investments LP v. Inilex, Inc., et al.*

American Arbitration Association, Phoenix, AZ

- Deposition: August 2007

*Eurofresh/Travelers v. Town of Snowflake, Arizona, et al.*

Superior Court of Arizona, Navajo County

- Deposition: October 2007
- Trial: February 2010

*Certain Underwriters at Lloyd's, London v. Delta Diversified Enterprises, Inc.*

Superior Court of Arizona, Maricopa County

- Deposition: August 2008

*Pipeline Data, Inc. adv. L60, Incorporated*

Superior Court of Arizona, Maricopa County

- Deposition: February 2009

*Richard Kavar v. JP Morgan Chase Bank N.A.*

U.S. District Court, Phoenix, AZ

- Deposition: February 2009

*Griffin v. Griffin*

Superior Court of Arizona, Maricopa County

- Deposition: April 2009
- Trial: December 2009

*Taser International, Inc. v. Stinger Systems, Inc.*

U.S. District Court, Phoenix, AZ

- Deposition: July 2009

*Archetype Associates, Inc. v. The Frank Lloyd Wright Foundation, et al.*

U.S. District Court, Phoenix, AZ

- Deposition: September 2009

*Bachmann v. BBK Tobacco & Foods, Inc.*

American Arbitration Association, Phoenix, AZ

- Arbitration: January 2010

*The Braun Corporation v. Vantage Mobility International, LLC*

U.S. District Court, Northern District of Indiana

- Deposition: January 2010

*Dunn v. Western Neurosurgery, Ltd.*

American Arbitration Association, Tucson, AZ

- Arbitration: February 2010



## Attachment B

### Bryce R. Cook

*Medicis Pharmaceutical Corporation v. Acella Pharmaceuticals, LLC*

U.S. District Court, District of Arizona

- Deposition: June 2011

*RB Insurance Group, LLC v. Sterling Life Insurance Company*

Arbitration, Phoenix, AZ

- Deposition: October 2011
- Arbitration: October 2011

*Nikolic v. Pepperidge Farm, Inc.*

Superior Court of Arizona, Maricopa County

- Deposition: August 2012
- Trial: January 2013

*Syntrix BioSystems, Inc. v. Illumina, Inc.*

U.S. District Court, Western District of Washington

- Deposition: December 2012
- Trial: March 2013

*Everett Laboratories, Inc. v. Acella Pharmaceuticals, LLC*

U.S. District Court, District of New Jersey

- Deposition: August 2013
- Deposition: August 2013
- Preliminary injunction hearing: August 2013

*Full Tilt, LLC v. Tilted Kilt Franchise Operating, LLC*

American Arbitration Association, Phoenix, AZ

- Deposition: August 2013
- Arbitration: September 2013

*AA & Saba Consultants, Inc. v. TASER International, Inc.*

Superior Court of Arizona, Maricopa County

- Trial: February 2014

*Barnet, et al. v. Medical Management Resources Group, LLC, et al.*

Superior Court of Arizona, Maricopa County

- Deposition: March 2014

*Bonsall v. Ryley, Carlock & Applewhite*

Superior Court of Arizona, Maricopa County

- Deposition: May 2014

*Rowpar Pharmaceuticals, Inc. v. Lornamead Brands, Inc..*

U.S. District Court, District of Arizona

- Deposition: July 2014

*BNC National Bank, et al. v. HUB International, et al.*

Superior Court of Arizona, Maricopa County

- Deposition: August 2014
- Trial: April-May 2015



## Attachment B

### Bryce R. Cook

*Rural/Metro Corporation adv. American Medical Response, LLC*

Arizona Office of Administrative Hearings

- Hearing: September 2014

*Stone Creek, Inc. v. Omnia Italian Design, Inc. et al.*

U.S. District Court, District of Arizona

- Deposition: April 2015
- Trial: October 2015

*Irish Restaurant and Pub Company, et al. v. Concast, Inc., et al.*

U.S. Bankruptcy Court, District of Arizona

- Deposition: May 2015

*AZ Sourcing Land Holding, LLC v. AZ Sourcing, LLC, et al.*

Private Arbitration - Phoenix, Arizona

- Deposition: September 2015
- Arbitration: October 2015

*Cardiovascular Consultants, LTD, v. Lee M. Ugol, et al.*

Superior Court of Arizona, Maricopa County

- Deposition: December 2015

*Paramount Petroleum Corporation v. International Surfacing Systems, et al.*

Superior Court of California, County of Sacramento

- Deposition: March 2016

*Polylast Systems, LLC v. Equiflex, et al.*

Superior Court of Arizona, Maricopa County

- Deposition: July 2016

*Bank of the West v. TriSports.com, et al.*

Superior Court of Arizona, Pima County

- Deposition: December 2016
- Trial: May 2017

*Hurry, et al. v. Financial Industry Regulatory Authority, et al.*

U.S. District Court, District of Arizona

- Deposition: February 28, 2017

*Zoetis LLC v. Roadrunner Pharmacy, Inc.*

U.S. District Court, District of New Jersey

- Deposition: April 2017

*Schires (Goldwater Institute) v. City of Peoria, et al.*

Superior Court of Arizona, Maricopa County

- Deposition: September 2017

## **EXHIBIT 2**



**Kars 4 Kids Inc.**

**v.**

**America Can!**

United States District Court, District of New Jersey  
Case No. 3:14-cv-07770-PGS-LHG

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March 1, 2018

**Expert Report of  
Bryce R. Cook**

**Highly Confidential – Outside Attorneys Only**

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EXPERT REPORT

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## EXPERT REPORT

### I. Introduction

Navigant Consulting was retained by counsel for America Can! to determine the damages or monetary remedy resulting from the infringement of the “Cars for Kids” trademark by Kars 4 Kids Inc. (“K4K”), as presented in my January 16, 2018 expert report. In this current report, I am responding to the rebuttal report of David Hall, dated February 15, 2018.

In developing my opinions, I have reviewed the pleadings filed in this matter, documents produced by the Plaintiff, and documents obtained in the course of performing my research and analysis. A list of the documents I considered is included in Attachment A.

The opinions and analyses presented in this report are based on currently available information. If new information becomes available that is relevant to my analysis or opinions, I may supplement this report. If this matter proceeds to trial, selected pages of the documents and information considered may be used as exhibits. In addition, I may prepare graphical or illustrative exhibits based on the contents of this report, the documents and information considered, and on my analysis of the documents and information.

See my previous expert report for my qualifications and prior expert testimony.

### II. Analysis of Mr. Hall’s Report

#### A. Substantiation of “Defendant’s Profits” Remedy

Mr. Hall claims that my accounting of K4K’s profits is inaccurate and unreliable, yet he uses the same source and numbers I relied on in performing his “apportionment of Kars 4 Kids’ vehicle donation revenue less expenses.” In an attempt to discredit my accounting of Defendant’s Profits, he makes a number of argumentative, invective-based claims, none of which invalidate my analysis but which instead serve to further substantiate the monetary remedy America Can is seeking. His rebuttal claims are addressed below.

#### Semantic Argument over use of the Term “Profits”

Mr. Hall makes a novel legal defense in response to my accounting of K4K’s profits, claiming that it is misleading and inaccurate because “Kars 4 Kids is a non-profit entity and as such, does not earn ‘profits on sales.’” He also claims that “because Kars 4 Kids is a non-profit entity, there are no profits to apportion.”<sup>1</sup> Based on this semantic argument, all non-profit entities would be immune from liability under Lanham Act claims for “Defendant’s Profits” (the term used in 15 U.S. Code § 1117) because, according to Mr. Hall, a nonprofit entity “does not earn profits on sales.”

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<sup>1</sup> Hall report, ¶¶17, 18, 30.



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However, assuming Congress's use of the term "profits" in the Lanham Act was meant to describe financial gain (i.e., revenues less expenses)<sup>2</sup> and not intended to exclude infringing nonprofit organizations from liability, there is nothing inaccurate or misleading about my use of the term or my quantification of K4K's revenues as required under the Lanham Act.<sup>3</sup> Indeed, Mr. Hall used my numbers as the starting point in his own "apportionment of Kars 4 Kids' vehicle donation revenue less expenses."<sup>4</sup> In addition, my accounting was in no way misleading since it explicitly stated the source and basis for the amount claimed ("summary of revenue")<sup>5</sup> and met the trademark registrant's burden of "proving defendant's sales only" under the Lanham Act. Mr. Hall's claiming that my statement was misleading is a gross mischaracterization, if not outright dishonest, or demonstrates lack of experience and understanding of trademark matters.

### Diversion of Donations from America Can to K4K

Mr. Hall claims that I have not adequately demonstrated that vehicle donations were diverted from America Can to K4K and takes issue with my opinion that "K4K's market entry and growth in each of CFK's markets, along with its high advertising spend, likely had an effect on CFK's donations and inability to return to previous levels."<sup>6</sup> In criticizing this opinion, he appears to be unaware that the Third Circuit used similar language in addressing the second factor in the *Banjo Buddies* case, which he cites. In addressing whether to award Defendant's Profits, the court found: "It is *likely* that [defendant's] conduct diverted sales from Banjo Buddies" on the basis that the marketing "was confusingly similar" and the "markets for the two products were 'either the same or substantially overlapping.'"<sup>7</sup>

Mr. Hall also criticizes the fact that I was unable to determine lost donations attributable to the infringement and that this "undermines" my basis for an accounting of Defendant's Profits.<sup>8</sup> This criticism demonstrates his lack of understanding of trademark infringement remedies, particularly recovery of Defendant's Profits. One reason this remedy exists is because it may not be possible for a plaintiff to determine the amount of actual damage caused by a defendant in these matters.<sup>9</sup>

<sup>2</sup> Per the online Oxford dictionary, the definition of "profit" is: "a financial gain, especially the difference between the amount earned and the amount spent in buying, operating, or producing something."

<https://en.oxforddictionaries.com/definition/profit>

<sup>3</sup> 15 U.S. Code § 1117 - Recovery for violation of rights. For applicability of this statute to a non-profit entity, see *Dreamcatcher Software Dev., LLC v. Pop Warner Little Scholars, Inc.*, 298 F. Supp. 2d 276 (D. Conn. 2004): "The clear text of the statute indicates that 15 U.S.C. 1125(a)(1) applies to 'any person.' Thus, the fact that a specific defendant is a not-for-profit organization does not protect it from liability under the plain language of the statute."

<sup>4</sup> Hall report, ¶¶27, 33, Attachment 1.

<sup>5</sup> Cook report, p. 9: "Based on the above **summary of revenue**, America Can!'s claim for K4K's profits on sales made using the infringing mark total **\$328,175,784**." The revenue amount shown is actually akin to "gross profit" since it is the net proceeds (selling price less fees paid to the auction company) K4K receives.

<sup>6</sup> Hall report, ¶¶20, 21, 57; Cook report, pp. 2-3.

<sup>7</sup> *Banjo Buddies, Inc. v. Joseph F. Renosky*, Appellant, 399 F.3d 168 (3d Cir. 2005) (emphasis added).

<sup>8</sup> Hall report, ¶¶20-23.

<sup>9</sup> See, for instance, *Venture Tape Corp. v. McGills Glass Warehouse*, F.3d 56 (1st Cir. 2008): "McGills first complains that Venture did not even attempt to show actual harm, and suggests that this failure means that there was no actual harm. Our case law does not support that inference. When a mark owner cannot prove actual damages attributable to the infringer's misconduct (e.g., specific instances of lost sales), its recovery of an equitable share of





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The inability to quantify the number of lost or “diverted” donations does not mean that there were no lost or diverted donations. It is inescapable that K4K’s entry into the vehicle-donation market took donations that otherwise would have gone to America Can. The two organizations are direct competitors in the same geographic markets, use the same or similar advertising methods, engage in charitable giving to kids, and compete for a finite number of vehicle donations.<sup>10</sup> To assume otherwise, one would have to assume that without K4K in the vehicle-donation market, America Can would not have picked up a single K4K donation – all of K4K’s donations would have gone to other car-donation charities or never would have been made.

I have not opined that every donation obtained by K4K was a lost donation to America Can. I recognize that some of the decline in, or loss of, America Can’s vehicle donations is likely due to other factors (e.g., the economy, the existence of other vehicle-donation charities, America Can’s own advertising spend), which is why I am unable to quantify a claim for lost donations and profits solely attributable to K4K’s actions. However, there is more than adequate evidence to conclude that K4K likely diverted donations from America Can, which, per *Banjo Buddies*, is a factor to be considered in an award of Defendant’s Profits.

### Deduction of Expenses

Mr. Hall criticizes, and again calls “misleading,” my accounting of Defendant’s Profits because I did not deduct expenses or apportion the profit related to “non-trademark factors.”<sup>11</sup> This criticism shows either a lack of familiarity with trademark infringement issues or disingenuousness, as the Lanham Act explicitly puts the burden of proving expenses and apportionment on the defendant.

Mr. Hall provided no analysis of his claimed deductions but simply accepted K4K’s total reported expenses, which he put into two broad categories and which reduced its bottom-line profit<sup>12</sup> to only 1.4% of its total net revenue, as summarized below.

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the infringer’s profits serves, *inter alia*, as a “rough measure” of the likely harm that the mark owner incurred because of the infringement, while also preventing the infringer’s unjust enrichment and deterring further infringement.”

See also, *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1408 (9th Cir. 1993): “Because proof of actual damage is often difficult, a court may award damages based on defendant’s profits on the theory of unjust enrichment. *Id.* at 511. See also *Bandag, Inc.*, 750 F.2d at 918. The district court gave Lindy the opportunity to prove its damages under both methods: actual damages in the form of its lost profits, or if that proved too difficult, through proof of Bic’s unjust enrichment in the form of Bic’s profits.”

See also, *Playboy Enterprises v. PK Sorren Export Co.*, 546 F. Supp. 987 (S.D. Fla. 1982): “The plaintiff need not demonstrate any actual damages in order to obtain an accounting for profits.”

<sup>10</sup> In *Banjo Buddies*, these are the kinds of business and marketing facts the Court considered in concluding that sales were diverted.

<sup>11</sup> Hall report, ¶24.

<sup>12</sup> Because “profit” is a familiar term to most people and the nonprofit-accounting term “change in net assets” is not, I will use the terms “profit” and “Defendant’s Profits” throughout this report to refer to K4K’s revenue less expenses.



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Table 1 – Summary of Mr. Hall’s Accounting of K4K’s Profits, 2008-2016 <sup>13</sup>	
Vehicle donation revenue	\$ 280,169,000
<u>Functional Expenses:</u>	
Fundraising portion of advertising and promotion	83,186,000
All other functional expenses	192,943,000
Total functional expenses	276,129,000
<b>Profit</b>	<b>\$ 4,040,000</b>

Mr. Hall assumes, without any analysis or support, that K4K’s total reported expenses were “incurred in generating vehicle donation revenue.”<sup>14</sup> He failed to provide any detail of what his expense categories consisted of, why he broke them out that way, or how they related to K4K’s car donation program. He also failed to include any revenue and expense for 2017, which he could have obtained from his client even if its 2017 Form 990 has not been filed. In my experience, Mr. Hall’s expense deductions do not adequately meet the defendant’s burden, per the Lanham Act, to “prove all elements of cost or deduction claimed,” and should therefore be disregarded.

In the *Banjo Buddies*<sup>15</sup> case cited by Mr. Hall, the court held that the defendant “failed to satisfy his burden of proof regarding costs and deductions . . . the court observed that the [defendant expert] report’s summary of direct expenses . . . was sorely lacking in detail, lumping costs into six broad categories with no explanation of what specific expenses those categories represented.” The court also rejected the expert report’s conclusion regarding the amount of shared expenses because it “did not show how ‘each item of general expense contributed to the production of the infringing items in issue and offer a fair and acceptable formula for allocating a given portion of overhead to the particular infringing items at issue.’ ”

The K4K expenses on its Form 990, which Mr. Hall failed to present or analyze, provide valuable information that a damages expert and the trier of fact would find useful in determining which expenses should be deducted or excluded. These expenses from K4K’s 2016 Form 990 are presented in the following table and are further analyzed below.

<sup>13</sup> Hall report, ¶27 and Attachment 1.

<sup>14</sup> Hall report, ¶27.

<sup>15</sup> See *Banjo Buddies* *supra*; see also, *Duro Co. of Ohio v. Duro Co. of New Jersey*, 56 F.2d 313, 315–16 (3d Cir. 1932): “It can be fairly said that large items of attempted charges against profits and large items of alleged depreciation should be itemized and should not be excepted [deducted], if generalized.”


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<b>Table 2 – 2016 K4K Form 990 – Statement of Functional Expenses</b>				
	<b>(A) Total Expenses</b>	<b>(B) Program services</b>	<b>(C) Management and general</b>	<b>(D) Fundraising</b>
Grants - Domestic	<b>\$ 18,262,163</b>	\$ 18,262,163	-	-
Grants - Foreign	<b>200,458</b>	200,458	-	-
Officers compensation	<b>260,077</b>	98,525	109,965	51,587
Other salaries & wages	<b>2,881,559</b>	413,252	1,222,977	1,245,330
Payroll taxes	<b>360,243</b>	97,266	133,290	129,687
Legal	<b>557,073</b>	-	557,073	-
Accounting	<b>81,312</b>	-	81,312	-
Advertising and promotion	<b>17,880,457</b>	2,769,881	81,472	15,029,104
Office expenses	<b>440,943</b>	135,682	202,624	102,637
Information technology	<b>59,396</b>	-	59,396	-
Occupancy	<b>22,213</b>	2,579	17,943	1,691
Travel	<b>15,724</b>	-	15,724	-
Depreciation	<b>3,641</b>	1,274	1,566	801
Insurance	<b>45,136</b>	-	45,136	-
Subscriptions	<b>84,247</b>	-	84,247	-
Merchant fees	<b>78,986</b>	-	78,986	-
Repairs and maintenance	<b>45,990</b>	16,097	19,776	10,117
Licenses and permits	<b>40,365</b>	-	40,365	-
Other expenses	<b>19,958</b>	19,958	-	-
<b>Total</b>	<b>\$ 41,339,941</b>	<b>\$ 22,017,135</b>	<b>\$ 2,751,852</b>	<b>\$ 16,570,954</b>

Per the Form 990 instructions, Column (B)–Program Services “are mainly those activities that further the organization's exempt purposes,”<sup>16</sup> which K4K reported in Part III of Form 990 as: “educational, developmental, and recreational programs for Jewish youth and their families.” Based on this description, these expenses did not contribute to K4K's generation of car donation revenue and should therefore not be deducted. Certainly, Domestic and Foreign Grants totaling \$18.5 million are wholly unrelated to K4K's vehicle-donation fundraising function and should be excluded from deductions. Mr. Hall acknowledged this very fact in his apportionment calculation wherein he excluded grants from total expenses “to determine what portion of Kars 4 Kids operational expenditures represents advertising in a fundraising capacity.”<sup>17</sup> The same treatment should apply to the more than \$600,000 in compensation/salary/payroll tax expenses K4K spends in running and managing its charitable programs, which is distinct from running and managing its vehicle-donation arm, the expenses of which are shown in Column (D) Fundraising. Likewise, the \$2.8 million in advertising expense relating to its charitable programs (e.g., brochures for summer

<sup>16</sup> <https://www.irs.gov/pub/irs-pdf/i990.pdf>

<sup>17</sup> Hall report, ¶¶32, 33.



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campus, ads for educational programs, etc.) are irrelevant to and do not support K4K's vehicle-donation operations and should not be deducted from revenues. Indeed, all Program Services expenses in Column (B) are required by the IRS to be specifically segregated into that category because they support K4K's charitable programs and not its vehicle-donation fundraising activities. Therefore, none of the Column (B) expenses should be deducted from vehicle-donation fundraising revenues.

Here is another way to look at relevant expenses. K4K is a charitable entity that has two main functions or business segments – (1) its fundraising function, which consists primarily of obtaining donated vehicles and selling them for a profit, and (2) its program services function, which consists of using the profits from fundraising for its charitable programs. If it were a for-profit entity whose primary business was obtaining donated vehicles and selling them for a profit, those profits would be paid to the owners or shareholders instead of being expended on non-business-related charitable programs. Any charitable causes it elected to spend its income on (a common expense item for most for-profit businesses) would not be deducted in an accounting of Defendant's Profits because charitable expenses are a discretionary expense that do not contribute to the business's sales and profits. Therefore, regardless of whether K4K is a non-profit entity, it does not make sense to deduct the profits it expends on its charitable programs or the expenses it incurs in running those programs because those expenditures do not contribute to the generation of the infringing revenue. In sum, any expenses that do not contribute to fundraising, or revenue generation, should not be deducted from revenue.

Per the Form 990 instructions, Column (C)–Management and General expenses “relate to the organization's overall operations and management, rather than to fundraising activities or program services. Overall management usually includes the salaries and expenses of the organization's chief executive officer and his or her staff, unless a part of their time is spent directly supervising program services or fundraising activities. In that case, their salaries and expenses should be allocated among management, fundraising, and program services.” These general overhead expenses – such as officer salaries, legal and accounting expense, and office rent – are the general shared expenses that support the overall organization. But because the overall organization consists of two main segments – its fundraising function and program services function, these expenses should be allocated between the two segments, if they are to be deducted at all. The *Banjo Buddies* court rejected the conclusion of the defendant's expert report regarding the amount of shared expenses because it “did not show how ‘each item of general expense contributed to the production of the infringing items in issue and offer a fair and acceptable formula for allocating a given portion of overhead to the particular infringing items at issue.’ ”

A number of court cases describe allocation methods for general overhead expenses such as these, which are typically allocated based on infringing-product revenue.<sup>18</sup> Because there is no

<sup>18</sup> See, e.g. *Duro Co. of Ohio v. Duro Co. of New Jersey*, 56 F.2d 313, 315–16 (3d Cir. 1932). *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F.Supp. 383, 406-07 (D.Md.1963).



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revenue associated with K4K's charitable program segment, general overhead expenses can be allocated based on the direct expenses of the two operating segments (Columns B and D), as shown in the following table.

Table 3 – Allocation of K4K Management and General Expenses (\$000's) <sup>19</sup>								
Year	(B) Program services	(C) Mgt. & general (M&G)	(D) Fund- raising	(E=B+D) Allocation Base	(F=B/E) Program services %	(G=D/E) Fund- raising %	(H=CxG) M&G allocated to Fundraising	(I=D+H) Fundraising with allocated M&G
2008	\$ 14,634	\$ 350	\$ 7,507	\$ 22,142	66%	34%	\$ 119	\$ 7,626
2009	15,469	389	7,658	23,127	67%	33%	129	7,787
2010	21,415	642	9,075	30,491	70%	30%	191	9,266
2011	20,339	805	10,048	30,387	67%	33%	266	10,314
2012	18,745	890	9,154	27,900	67%	33%	292	9,446
2013	18,019	982	8,668	26,687	68%	32%	319	8,987
2014	19,482	1,441	9,918	29,400	66%	34%	486	10,404
2015	23,520	2,527	13,110	36,630	64%	36%	905	14,015
2016	22,017	2,752	16,571	38,588	57%	43%	1,182	17,753
<b>Total</b>	<b>\$ 173,640</b>	<b>\$ 10,778</b>	<b>\$ 91,711</b>	<b>\$ 265,351</b>			<b>\$3,888</b>	<b>\$ 95,599</b>

Per the Form 990 instructions, Column (D)–Fundraising expenses “are the expenses incurred in soliciting cash and noncash contributions, gifts, and grants.” Based on this description, these expenses directly relate to the generation of vehicle-donation revenue, and could properly be deducted from claimed revenues. The largest expense in this category is Advertising and promotion of \$15.0 million (see Table 2), which would include use of the infringing mark. Some courts have held that expenses incurred in advertising the infringing mark will not be deducted.<sup>20</sup> Nevertheless, assuming all Column (D) expenses and the portion of Column (C) expenses allocated to Column (D) above are legitimate deductions, Defendant's Profits are summarized below.

<sup>19</sup> K4K IRS Form 990 for years 2008-2016

<sup>20</sup> Weil, Roman, *et al. Litigation Services Handbook*, 4<sup>th</sup> Edition (2007), p 20•29.



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Table 4 – Calculation of Defendant's Profits			
Year	Revenue <sup>21</sup>	Less Fundraising <sup>22</sup>	Defendant's Profits
2008	\$ 23,003,060	\$ 7,625,989	\$ 15,377,071
2009	24,653,912	7,787,287	16,866,625
2010	29,130,893	9,266,388	19,864,505
2011	29,976,125	10,314,006	19,662,119
2012	26,964,821	9,446,363	17,518,458
2013	28,229,162	8,987,289	19,241,873
2014	34,756,266	10,404,266	24,352,000
2015	39,071,455	14,014,932	25,056,523
2016	44,383,024	17,752,687	26,630,337
2017 <sup>23</sup>	48,007,066	19,202,261	28,804,805
<b>2008-2017</b>	<b>\$ 328,175,784</b>	<b>\$ 114,801,468</b>	<b>\$ 213,374,316</b>

The above measure of Defendant's Profits is more reasonable than Mr. Hall's measure, which simply accepts all of K4K's reported expenses as deductions without any analysis or support and results in profit of only 1.4% of revenue. In *Banjo Buddies*, the Third Circuit found that defendant expert's "'bottom line' lacks credibility" because it showed no profits after deducting costs. Similarly, Mr. Hall's insignificant bottom line, which includes four years of losses out of a nine-year period, lacks credibility.

In addition to improperly deducting expenses that do not relate to the company's revenue-generating fundraising segment, Mr. Hall improperly offsets total profits with four years of losses.<sup>24</sup> In an authoritative text on trademarks, *McCarthy on Trademarks*, the author observes, "Where, during the infringement period, defendant has some loss years and some profit years, the Ninth Circuit has held that defendant is not entitled to set off loss years against profit years, but must account to plaintiff for profits made in any one year."<sup>25</sup> Various Third Circuit cases advocate a similar approach.<sup>26</sup>

An alternative measure of K4K's profit is the grant funds it provides to charitable organizations, as this amount is an indication of the funds it has available to donate after paying all its operating expenses required to generate those funds. The primary recipient of these funds is K4K's sister company, Oorah, as shown in the following table.

<sup>21</sup> Total Contributions and Grants as listed on Form 990.

<sup>22</sup> See Table 3, column I

<sup>23</sup> 2017 revenue estimated by applying latest 5-year (2011-2016) CAGR (8.2%) to 2016 revenue. 2017 fundraising estimate based on 2016 fundraising w/allocated M&G (see Table 3) divided by 2016 revenue and multiplied by estimated 2017 revenue.

<sup>24</sup> Hall report, Attachment 1.

<sup>25</sup> McCarthy on Trademarks and Unfair Competition, Third Ed. (1995), p. 30-111.

<sup>26</sup> Jones Apparel Group, Inc. v. Steinman, 466 F.Supp. 560, 563 n. 4 (E.D. Pa. 1979). Carter Products, Inc. v. Colgate-Palmolive Co., 214 F.Supp. 383, 406-07 (D.Md.1963). MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F.2d 553, 555 (W.D.Pa.1927).



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Table 5 – Oorah Income from Kars 4 Kids				
Year	Oorah <sup>27</sup>	Domestic Non-Oorah <sup>28</sup>	Non-Domestic <sup>29</sup>	Total Grants from K4K
2008	\$ 14,520,000	\$ 4,800	-	<b>\$ 14,524,800</b>
2009	12,700,000	-	-	<b>12,700,000</b>
2010	19,487,834	-	-	<b>19,487,834</b>
2011	18,118,906	-	-	<b>18,118,906</b>
2012	14,484,318	-	-	<b>14,484,318</b>
2013	12,601,932	-	-	<b>12,601,932</b>
2014	13,058,550	721,789	-	<b>13,780,339</b>
2015	17,196,997	88,254	95,044	<b>17,380,295</b>
2016	18,262,163	-	200,458	<b>18,462,621</b>
2017 <sup>30</sup>	19,753,338			<b>19,753,338</b>
<b>Total</b>	<b>\$ 160,184,038</b>	<b>\$ 814,843</b>	<b>\$ 295,502</b>	<b>\$ 161,294,383</b>

Based on the above measures in Tables 4 and 5, K4K's revenue from its vehicle-donation program, less related expenses – i.e., Defendant's Profits per the Lanham Act – are **\$161.3 million to \$213.4 million**.

### Apportionment of Defendant's Profits

While the Lanham Act does not specifically mention apportionment, many courts have addressed it in Lanham Act decisions.<sup>31</sup> As discussed in *McCarthy on Trademarks*, apportionment in this context means "the infringer's burden to prove the proportion of his total profits which may not have been due to use of the infringing mark."<sup>32</sup> McCarthy cites the U.S. Supreme Court on this issue, which concluded that: "[A] sufficient reason for not requiring complainant in the present case to make an apportionment between the profits attributable to defendant's use of the offending mark and those attributable to the intrinsic merit of defendant's shoes is that such an apportionment is inherently impossible."<sup>33</sup> He follows with a similar California Supreme Court opinion:

The difficulty lies in ascertaining what proportion of the profit is due to the trademark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and

<sup>27</sup> K4K IRS Form 990, Schedule I

<sup>28</sup> Difference between K4K IRS Form 990, Part IX, Line 1 and grants to Oorah in previous column.

<sup>29</sup> K4K IRS Form 990, Part IX, Line 3

<sup>30</sup> 2017 K4K grants to Oorah estimated based on 2016 K4K grants to Oorah divided by 2016 total revenue and multiplied by estimated 2017 revenue in Table 4 (\$19,753,338 = 18,262,163 / 44,383,024 x 48,007,066)

<sup>31</sup> *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1408 (9th Cir. 1993); see also, e.g., *Holiday Inns, Inc. v. Airport Holiday Corp.*, 493 F. Supp. 1025 (N.D. Tex. 1980), aff'd, 683 F.2d 931 (5th Cir. 1982); *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, No. 94-CIV-2663(RPP), 1999 WL 108739, at \*4 (S.D.N.Y. Mar. 3, 1999), on remand from 146 F.3d 66 (2d Cir. 1998), aff'd, No. 99-7329, 2000 WL 220504 (2d Cir. Jan. 12, 2000).

<sup>32</sup> *McCarthy*, p. 30-102.

<sup>33</sup> *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 60 L. Ed. 629, 36 S.Ct. 269 (1916) (as cited in *McCarthy supra*).





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justice that the owner of the trademark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant.<sup>34</sup>

McCarthy goes on to say: “But if the infringer can prove a fair basis of apportionment, then profits awarded will be apportioned according to the effect the infringement had on the infringer’s sales.”<sup>35</sup>

Mr. Hall claims to have “apportioned Kars 4 Kids \$4.040 million of vehicle donation revenues less expenses,” although he does not say what he is apportioning it to.<sup>36</sup> The purpose of apportionment, as explained above, is to determine the amount of the infringer’s profits attributable to the alleged infringement versus other factors. Therefore, assuming Mr. Hall understands this, because his apportionment calculation is based on the ratio of K4K’s advertising expense incurred in its fundraising segment divided by its total reported expenses, less grants paid to charities, he is implicitly acknowledging that all advertising and promotion done for fundraising (i.e., to solicit vehicle donations) was allegedly infringing. This assumption is consistent with Esti Landau’s deposition testimony that almost all the advertising expense for fundraising related to the alleged infringing Mark.<sup>37</sup>

Although he never explains it, Mr. Hall’s apportionment calculation, what he terms the “Advertising for Fundraising Ratio,” appears to be based on the following logic: K4K spends X dollars operating the company (total functional expenses less grants), and its alleged infringing advertising (advertising expense for fundraising) makes up Y dollars of those operations; therefore, the resulting ratio of Y/X reflects the infringing activity as a percent of the company’s total operating activity. This apportionment calculation is mechanically incorrect, as it is comparing expenses from unrelated operating segments. The denominator – which he calculates as total functional expenses less grants – reflects more than the company’s operating expenses of its fundraising segment. He appropriately deducted grants – which, as discussed above, do not generate revenue – from the denominator but failed to remove all other non-fundraising-related expenses. Thus, he has a mismatch between advertising expense for the fundraising function on one hand, and operating expense that still includes program services on the other.<sup>38</sup> Because K4K revenue is only generated from the company’s fundraising segment, only expenses from that segment should be included in his apportionment denominator to avoid the mismatch, as shown in the table below.

<sup>34</sup> *Graham v. Plate*, 40 Cal. 593 (1871) as cited in *McCarthy*.

<sup>35</sup> *McCarthy*, p. 30-104.

<sup>36</sup> Hall report, ¶31.

<sup>37</sup> Landau deposition, pp. 27-32

<sup>38</sup> I understand that per Note 4 of K4K’s 2016 audited financial statements that K4K does some “joint” advertising that includes both segments and therefore allocates those joint advertising costs, which shows that K4K understands the necessity of allocating its advertising expense to fundraising versus the other segments.




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Table 6 – Corrected Apportionment Calculation <sup>39</sup>			
Year	K4K Advertising for Fundraising	- <b>Incorrect</b> - K4K Total Functional Expenses Less Grants	- <b>Correct</b> - K4K Total Expenses for Fundraising <sup>40</sup>
2008	\$ 6,838,060	\$ 7,966,390	\$ 7,625,989
2009	6,760,187	10,816,616	7,787,287
2010	7,954,302	11,645,143	9,266,388
2011	9,151,788	13,072,372	10,314,006
2012	8,560,901	14,305,475	9,446,363
2013	7,982,919	15,066,952	8,987,289
2014	9,048,707	17,060,400	10,404,266
2015	11,859,532	21,777,117	14,014,932
2016	15,029,104	22,877,320	17,752,687
Total	\$ 83,185,500 (a)	\$ 134,587,785 (b)	\$ 95,599,207 (c)
		(a / b)	(a / c)
<b>Allocation %</b>		<b>61.8%</b>	<b>87.0%</b>

## B. Support for “First to Market Analysis”

In my original report, I performed an analysis which demonstrated that America Can “preceded K4K in most states (based on when an organization first reported donations) ...”<sup>41</sup> Mr. Hall criticizes this analysis but provides no alternative analysis or rationale as to why it is inappropriate—other than to state his opinion that it somehow constitutes a legal opinion regarding when the trademark is first used. Mr. Hall’s assumption is incorrect, as I never stated that first-reported donations equated to first use of the trademark (although it is reasonable to assume such events would be closely correlated). My analysis simply demonstrated who was first in the car donation market based on earliest reported donations, and that K4K surpassed America Can in the number of donations in each state, except for Texas, soon after its entry. Because America Can’s first donations in each state were generally two or more years in advance of K4K’s (five years on average), it is reasonable to conclude that America Can entered the market first and used the mark first in those states. For Mr. Hall’s criticism to be valid, he would need to show evidence that K4K began using the mark first but was unable to obtain a single donation for two or more years thereafter.

<sup>39</sup> Source: Kars 4 Kids Form 990’s

<sup>40</sup> Source is Table 4, Fundraising column that includes both Fundraising expense and allocated Management and General expense.

<sup>41</sup> Cook report, p. 6. My statement that “CFK began using the Mark first” is independent of my analysis of who preceded whom in donations in each state. “First use” is a liability assumption that I am accepting from counsel.



## EXPERT REPORT

### C. Impact of K4K on America Can's Sales

Mr. Hall repeats the same argument raised in his Opinion 1, criticizing my opinion that “K4K’s market entry and growth in each of CFK’s markets, along with its high advertising spend, likely had an effect on CFK’s donations and inability to return to previous levels.”<sup>42</sup> As stated above, I do not ignore the impact of other factors on America Can’s donations, which is the primary reason I was unable to perform a calculation of America Can’s actual lost-donations damages and which is a common situation in trademark matters. My response here, as above, is that it is inescapable that K4K’s entry into the vehicle-donation market took donations that otherwise would have gone to America Can. Mr. Hall has done nothing to invalidate that conclusion. He has attempted to show that other factors contributed to America Can’s loss of sales and market share, or that America Can has performed well against the market, as though he were rebutting an actual-damages lost-profits analysis, which is not relevant here. But other than his simplistic apportionment calculation discussed above, he has failed to meet defendant’s burden to demonstrate what portion of K4K’s revenues relate to the alleged infringement versus other factors. Nevertheless, I will address the factors he cites as having an impact on America Can’s donations.

#### Other Car-Donation Charities

Mr. Hall points out that other car-donation charities were in the vehicle-donation market, “potentially impacting AC’s market share,” and that “This is a factor that likely impacted AC’s donations, other than Kars 4 Kids’ alleged use of the mark, that Mr. Cook ignores.”<sup>43</sup> While Mr. Hall exhibits no qualms using the words “potentially” and “likely” in his opinions, the results of his market-share analysis – in which he notably left out the shares of K4K and the rest of the market – indicate something different, as shown in the following table.

---

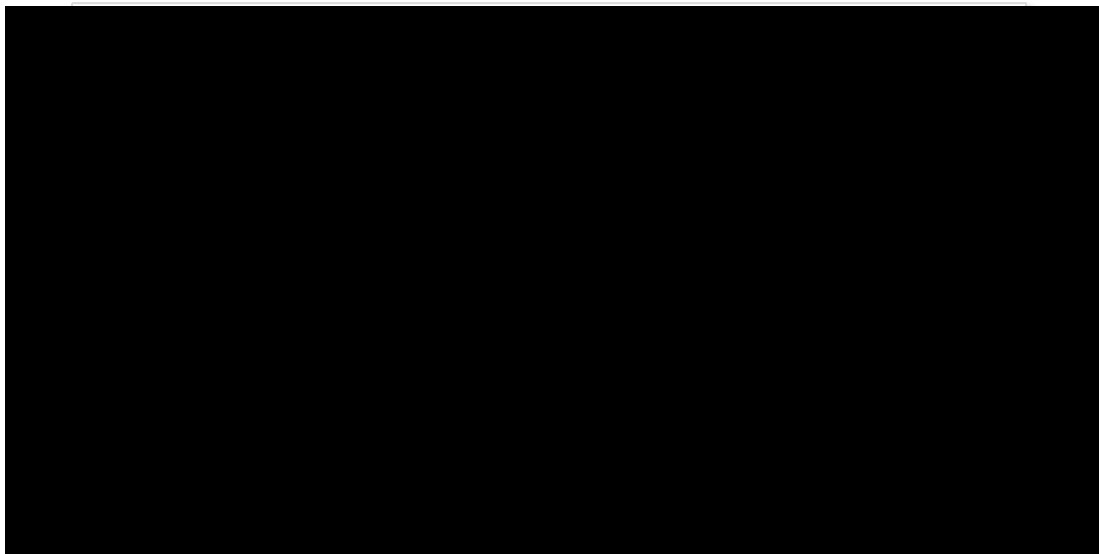
<sup>42</sup> Hall report, ¶¶38, 39.

<sup>43</sup> Hall report, ¶¶40, 41.


**EXPERT REPORT**

Table 7 – Donated Vehicles – Market Share Over Time							
Year	U.S. Total	AC	K4K	All Others	AC Share	K4K Share	All others Share
2004	970,516	15,334			1.6%		
2005	325,372	11,503			3.5%		
2006	318,498	13,835			4.3%		
2007	343,202	14,757			4.3%		
2008	271,136	14,300			5.3%		
2009	213,833	14,483			6.8%		
2010	193,531	9,471			4.9%		
2011	190,539	7,811			4.1%		
2012	164,449	7,391		1	4.5%		
2013	146,274	7,436			5.1%		
2014	176,970	7,819			4.4%		
<b>Market share increase/decrease, 2004-2014</b>					<b>+ 2.8%</b>		
<b>Percentage change in market share, 2004-2014</b>					<b>180%</b>		
<b>2014 market share without K4K (assuming K4K donations split pro rata between AC and All others)</b>					<b>8.2%</b>	<b>-</b>	

As shown above, America Can's market share more than doubled (180% increase) over the 10-year period, 2004 to 2014, while the "All others" market share [REDACTED] and became the dominant player in the vehicle-donation market, as shown in the following chart.<sup>44</sup>



<sup>44</sup> See Attachment C for source numbers. The "All others" in this chart differs from that in the table above it due to breaking out Wheels for Wishes from All others in the chart.



## EXPERT REPORT

As shown in Table 7 above, without K4K in the market, and allocating its donations between America Can and All others, America Can's 2014 market share would almost double, from 4.4% to 8.2%. These market share changes, along with the other similarities between K4K and America Can, indicate that K4K likely took share from America Can and All others, as well as potentially increased the total market. However, the numbers alone do not provide the basis to conclude, as Mr. Hall erroneously does, that All others took share from America Can.

Mr. Hall makes at least six references to America Can's increase in donations and outperforming the market.<sup>45</sup> With this heavy emphasis on America Can's donation performance, he appears to imply that simply because its market share increased, it was not affected by K4K's dominating market presence. He fails to acknowledge that America Can's donations and market share could have been higher absent K4K's market entrance and use of the mark. As discussed above, given the similarity of their markets, services, charitable focus, etc., it would be implausible to assume that America Can did not lose some market share to K4K.

### Advertising Spend

Mr. Hall takes issue with the findings from my analysis that shows that, while America Can was first to market in 42 of 51 states (by two or more years in 40 states), K4K surpassed America Can's donation level in each state generally within one to two years of its entry and came to dominate the market.<sup>46</sup> And as shown in Table 2 of my previous report, K4K far surpassed America Can in advertising spend.

Despite these findings, Mr. Hall appears to be arguing that K4K had no impact on America Can's donations in states outside of Texas. He also states that "It is reasonable to conclude that AC's decision to reduce its advertising spending impacted its vehicle donations."<sup>47</sup> While it may be reasonable to draw that conclusion, another reasonable conclusion is that as K4K came to dominate the market while using the infringing Mark in its advertising, and America Can's vehicle donations declined to generally less than 10 units per state outside of Texas, it made financial sense for America Can to reduce its advertising spending—especially if it believed marketplace confusion was diverting donations to K4K and damaging America Can's reputation and good will.

Mr. Hall stated that K4K's advertising expense per donated vehicle is much less than that of America Can. He did not indicate what point he was trying to make with this observation or how it supported his opinions. However, his analysis failed to consider the value of donations received and was focused only on units. K4K may receive more vehicle donations than America Can and have a lower advertising spend per unit, but its average revenue per vehicle is generally less than half that of America Can's, as shown below.

---

<sup>45</sup> Hall report, ¶¶46-49.

<sup>46</sup> Cook report, Table 3.

<sup>47</sup> Hall report, ¶53.



## EXPERT REPORT

Table 8 – Average Revenue per Vehicle <sup>48</sup>		
Year	AC	K4K
2008	\$ 693	\$ 305
2009	639	278
2010	862	388
2011	1,020	529
2012	1,082	495
2013	1,011	430
2014	1,033	427
2015	863	427
<b>Average</b>	<b>\$ 900</b>	<b>\$410</b>

Mr. Hall states that the inability of the overall vehicle-donation market and America Can to recover their pre-recession level of donations “suggests that Kars 4 Kids’ advertising is more effective on a dollar-for-dollar basis than AC’s advertising for reasons unrelated to the use of the [Marks]...”<sup>49</sup> This opinion is purely speculative, as he has provided no evidence to support how donors and prospective donors respond to the Mark versus other aspects of the advertising done by the parties (e.g., the K4K “jingle”).

### Reliance on a Spurious Website

In an apparent attempt to show why donors might prefer K4K over America Can, Mr. Hall cites a single website, donationtips.com, that has eight different “top” or “best” lists for car donation charities, including “Top 6 Charities to Donate a Car in Denver” (or Los Angeles, or Sacramento, or New York, etc.). Mr. Hall only referred to the “The 6 Best Car Donation Charities in the US” list, which happens to include K4K at number six. But he failed to mention that, somewhat confusingly, none of the other “top” or “best” lists by city on the site include K4K. He also failed to mention that “The 4 Most Reputable Car Donation Charities” articles on the website included America Can but not K4K.

From the “Best” list article cited by Mr. Hall, he quoted four alleged “additional benefits” offered by K4K “in contrast with other non-profits that accept vehicles.” However, he failed to do any research showing (or simply opted not to disclose) that America Can offers the same or better benefits, as summarized below.

<sup>48</sup> See Attachment C for source numbers.

<sup>49</sup> Hall report, ¶57.



# EXPERT REPORT

Table 9 – Comparison of “Benefits”	
K4K Benefits from Article	America Can Benefits <sup>50</sup>
They can pick up a car donation without a title with some additionally signed paperwork.	Same. But K4K subcontracts this out whereas America Can does its own title work. Also, America Can can do same-day pickup.
The donor does not need to be present at the time of the pick-up of the donated car.	Same
Towing representatives from all 50 states, licensed and insured.	Same
The donor will get a 3-day, 2-night hotel voucher with its donation.	Since this has caused many complaints for both parties, America Can now offers a \$50 Visa gift card, or Texas Ranger tickets when in season.
--	Platinum badge from Guidestar.org ( <a href="https://www.guidestar.org/profile/46-2077931">https://www.guidestar.org/profile/46-2077931</a> )
--	2017 Top-Rated Nonprofit from Greatnonprofits.org ( <a href="https://greatnonprofits.org/awards/search/search:cars+for+kids">https://greatnonprofits.org/awards/search/search:cars+for+kids</a> )

In addition to Mr. Hall’s biased and selective disclosure of information from this website, he failed to do any due diligence to test the legitimacy and integrity of the site or its creator. The “about” section tells nothing about the entity that created the site or more importantly the criteria that it uses to rank its “best” charities or a statement representing its independence, *i.e.*, whether it receives any remuneration from organizations featured in the lists (which is often the case with these kinds of review sites<sup>51</sup>).

I checked the website registration and found that it was registered to Felix Ocampo Luces, and the registrant organization was Grupo FLX CA in Caracas, Venezuela.<sup>52</sup> The registrant address could not be found on any online maps. However, Grupo FLX CA has a website with phone numbers and an email address (no physical address). It appears to be a family-owned business in Caracas that provides road and construction signage. Felix Ocampo Luces (the name “felixol” also appears on the donationtips.com website) is a young man currently studying languages in Hangzhou, China.<sup>53</sup> We sent emails to Felix’s personal email address (provided by his mother) and to the email address shown on donationtips.com asking about the website content and sponsorship and have not received any reply, which along with the other findings strongly indicates that the website is a sham. Mr. Hall’s reliance on this website shows lack of independence and due care expected of an independent expert.

<sup>50</sup> From America Can website; information provided by America Can’s COO, Malcolm Wentworth; other sources as noted.

<sup>51</sup> See, e.g., <https://www.theguardian.com/money/2013/jan/26/fake-reviews-plague-consumer-websites>

<sup>52</sup> Website registration search from <https://www.godaddy.com/whois>

<sup>53</sup> This according to his mother—who answers the phone at Grupo FLX—and according to Felix’s Facebook page.



## EXPERT REPORT

Furthermore, while Mr. Hall touted the one positive website he found, he neglected to mention all the negative attention K4K has received over the years, which tends to invalidate the point he was trying to make even if donationstips.com were a legitimate source.<sup>54</sup>

### **D. Mischaracterization and/or Misunderstanding of Liability Assumption and Marketplace Confusion**

Mr. Hall claims that my statement, “K4K has spent over \$75 million in advertising that wrongfully used the Mark from 2004 through 2014,” is a legal conclusion.<sup>55</sup> Interestingly, Mr. Hall’s own apportionment calculation implicitly assumes that K4K’s advertising in fundraising is infringing (assuming he understands that the purpose of an apportionment calculation is to apportion revenue to infringing actions versus other factors). When damages experts perform their analysis of damages, they presume liability, which, in this case, is that K4K’s use of the term “KARS 4 KIDS” is wrongful use. As a damages expert I offer no legal opinion regarding infringement or confusion.

Mr. Hall made several repetitive criticisms of my reference to K4K documents that indicate confusion in the marketplace and by donors.<sup>56</sup> He mistakenly believes or purposely misconstrues this evidence to mean that I was using it to show “examples of diverted donations.” My intent was simply to show examples of confusion in the marketplace, which Mr. Hall apparently does not understand the purpose of in trademark cases.<sup>57</sup> Regardless, as stated above, I am not opining on or providing any analysis of confusion, but in this instance simply observing that the record shows it existed.

<sup>54</sup> Here are a few examples:

- K4K Management presentation entitled, “Points of Negativity,” K4K0113205 reputation-C2.pdf
- Minnesota Compliance Review, CAN-0017925-84
- BBB Report: K4K0551845-49
- D Rating by Charity Watch: <https://www.charitywatch.org/ratings-and-metrics/kars4kids/757>
- Costly and Continuous Kars4Kids Ads Disguise Charity’s Real Purpose: <https://www.charitywatch.org/charitywatch-articles/costly-and-continuous-kars4kids-ads-disguise-charity-39-s-real-purpose/179>
- Catchy Jingle Not a Green Light to Donate: <https://www.charitywatch.org/charitywatch-articles/catchy-jingle-not-a-green-light-to-donate/92>
- Kars4Kids is questioned by charity watchdogs: <http://www.startribune.com/kars4kids-is-questioned-by-charity-watchdogs/136191368/>
- Dedicated blog to report K4K alleged scams: <http://kars4kids-scam.blogspot.com/>
- K4K Misleading Free Vacation Offer with Donation per Ripoff Report: <https://www.ripoffreport.com/reports/kars-4-kids/lakewood-new-jersey-08701/kars-4-kids-misleading-free-vacation-offer-with-donation-lakewood-new-jersey-263345>

<sup>55</sup> Hall report, ¶61. To the extent the portion of K4K’s total advertising expense of \$75 million in program services and management does not use the “Kars 4 Kids” Mark, there would clearly be no wrongful use of the Mark associated with that portion of the total advertising expense.

<sup>56</sup> Hall report, ¶¶23, 59, 62.

<sup>57</sup> See, e.g., *Interpace Corporation v. Lapp, Inc.*, 721 F.2d 460 (3d Cir. 1983): “The law of trademark protects trademark owners in the exclusive use of their marks when use by another would be likely to cause confusion. Where the trademark owner and the alleged infringer deal in competing goods or services, the court need rarely look beyond the mark itself.”



## EXPERT REPORT

Mr. Hall also criticized my mention of a corrective advertising approach to damages because I did not identify a methodology for making that determination. One methodology for quantifying such damages would be to assume that American Can would be required to spend the same amount on fundraising advertising as K4K to correct confusion in the marketplace and reinstate itself in the public eye as owner of the Mark. That measure for the nine-year period, 2008 to 2016, based on K4K's advertising expense for fundraising totals **\$83.2 million** (see Table 6 above).



Bryce R. Cook





EXPERT REPORT

ATTACHMENT A

**Documents Considered**  
(Added since original report)

- 
- Expert report of David Hall dated February 15, 2018
  - Expert report of Melissa A. Pittaoulis dated February 15, 2018
  - America Can Cars for Kids 2015 Form 990
  - America Can (dba Texas Can) 2015 Form 990
  - Car Donation Foundation (dba Wheels for Wishes) 2010-2016 Form 990
  - Depositions of Eliyohu Mintz, Esti Landau Highly, Malcom Wentworth, Malka Keller, Asher Moskovits, Cheryl Poldugrach, and Richard Marquez
  - 2003-2014 IRS Non-Cash Individual Contribution Report
  - CAN-00178740 – CAN-00179617
  - K4K0062233 impacts to car donations-C2.pdf
  - K4K0113205 reputation-C2.pdf
  - K4K0113212 2010 to 2011 msn marketing reports-C2.xls
  - K4K0113213 2010 to 2011 msn marketing reports-C2.xls
  - K4K0113214 2011 car donations by state-C2.xls
  - K4K0113215 2010 to 2011 msn marketing reports-C2.xls
  - K4K0113216 2004-2012 google ppc-C2.xls
  - K4K0113217 2008 - 2011 online versus offline donations-C2.xls
  - K4K0113218 2002 to 2011 reports-C2.xls
  - K4K0113219 2010 to 2011 msn marketing reports-C2.xls
  - K4K0113220 2008 to 2011 searches-C2.xls
  - K4K0138532 2012 program advertising and In-kind-C2.xls
  - <https://en.oxforddictionaries.com>
  - 15 U.S. Code § 1117 - Recovery for violation of rights.
  - *Dreamcatcher Software Dev., LLC v. Pop Warner Little Scholars, Inc.*, 298 F. Supp. 2d 276 (D. Conn. 2004)
  - *Banjo Buddies, Inc. v. Joseph F. Renosky*, Appellant, 399 F.3d 168 (3d Cir. 2005)
  - *Venture Tape Corp. v. McGills Glass Warehouse*, F.3d 56 (1st Cir. 2008)
  - *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1408 (9th Cir. 1993)
  - *Bandag, Inc.*, 750 F.2d at 918.
  - *Playboy Enterprises v. PK Sorren Export Co.*, 546 F. Supp. 987 (S.D. Fla. 1982)
  - *Duro Co. of Ohio v. Duro Co. of New Jersey*, 56 F.2d 313, 315–16 (3d Cir. 1932)
  - <https://www.irs.gov/pub/irs-pdf/i990.pdf>
  - *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F.Supp. 383, 406-07 (D.Md.1963)
  - K4K IRS Form 990 for years 2008-2016
  - Weil, Roman, *et al. Litigation Services Handbook*, 4<sup>th</sup> Edition (2007)
  - McCarthy on Trademarks and Unfair Competition, Third Ed. (1995), p. 30-111.
  - *Jones Apparel Group, Inc. v. Steinman*, 466 F.Supp. 560, 563 n. 4 (E.D. Pa. 1979).
  - *MacBeth Evans Glass Co. v. L. E. Smith Glass Co.*, 21 F.2d 553, 555 (W.D.Pa.1927).
  - *Holiday Inns, Inc. v. Airport Holiday Corp.*, 493 F. Supp. 1025 (N.D. Tex. 1980), *aff'd*, 683 F.2d 931 (5th Cir. 1982)



## EXPERT REPORT

- Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., No. 94-CIV-2663(RPP), 1999 WL 108739, at \*4 (S.D.N.Y. Mar. 3, 1999), on remand from 146 F.3d 66 (2d Cir. 1998), aff'd, No. 99-7329, 2000 WL 220504 (2d Cir. Jan. 12, 2000).
- *Interpace Corporation v. Lapp, Inc.*, 721 F.2d 460 (3d Cir. 1983):
- <https://www.guidestar.org/profile/46-2077931>
- <https://greatnonprofits.org/awards/search/search:cars+for+kids>
- <https://www.theguardian.com/money/2013/jan/26/fake-reviews-plague-consumer-websites>
- <https://www.godaddy.com/whois>
- American Can Website
- Kars4Kids website

*America Can! v. Kars 4 Kids*  
**Market Share Analysis**

**Attachment B**

								Allocation of K4K Units to America Can and All Others								
Year	Unit Donations <sup>(1)</sup>				Market Share			Market Share [AC & All Others Only]		Allocation of K4K Units		But-for Market with K4K Units Allocated				
	U.S. Total	AC	K4K	All Others	AC	K4K	All Others	AC	Others	AC	Others	Unit Donations			Market Share	
												AC	Others	Total	AC	Others
2004	970,516	15,334			1.6%											
2005	325,372	11,503			3.5%											
2006	318,498	13,835			4.3%											
2007	343,202	14,757			4.3%											
2008	271,136	14,300			5.3%											
2009	213,833	14,483			6.8%											
2010	193,531	9,471			4.9%											
2011	190,539	7,811			4.1%											
2012	164,449	7,391			4.5%											
2013	146,274	7,436			5.1%											
2014	176,970	7,819			4.4%											

**Change in Market Share:**

Market share increase/decrease, 2004-2014	2.8%		
Percentage change in market share, 2004-2014	180%		

**Notes:**

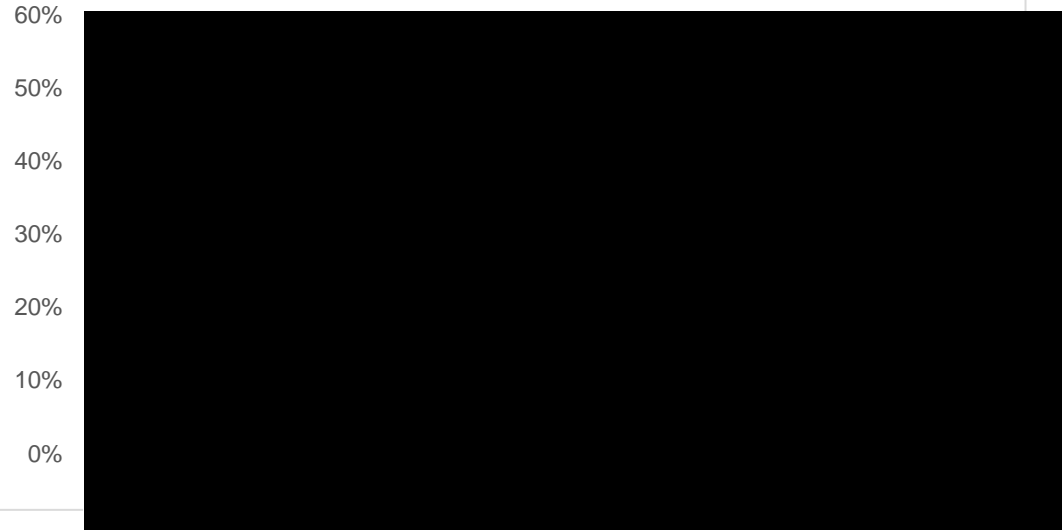
- (1) U.S. Total units per IRS Non-Cash Individual Contribution Reports  
AC units per CAN-00177453 (also known as "CFK Sales 2004 - 2017.xls")  
K4K units per K4K0089669.xls

*America Can! v. Kars 4 Kids***Attachment C****Market Share Analysis with Wheels for Wishes**

Calculation of Wheels for Wishes Vehicle Donation Units									
Calculation of American Can and Kars 4 Kids Avg. Revenue per Unit									
America Can!				Kars 4 Kids			Wheels for Wishes <sup>(2)</sup>		
Year	Revenue	Units	\$ per Unit	Revenue	Units	\$ per Unit	Avg. \$ per Unit	Revenue	Est. Units (Avg. \$ per Unit)
2008	\$ 9,908,857	14,300	\$ 693				\$ 499		
2009	9,261,402	14,483	639				459		
2010	8,165,092	9,471	862				625	\$ 2,153,161	3,443
2011	7,970,247	7,811	1,020				775	14,381,579	18,568
2012	7,993,764	7,391	1,082				788	25,724,026	32,631
2013	7,519,794	7,436	1,011				721	30,707,640	42,598
2014	8,073,314	7,819	1,033				730	37,305,950	51,106
2015	7,350,814	8,518	863				645	31,098,064	48,199
Avg.			\$ 900						

**Market Share Percentages**

Year	U.S. Total	AC	K4K	Wishes for	All Others
2010	100%	5%		2%	
2011	100%	4%		10%	
2012	100%	4%		20%	
2013	100%	5%		29%	
2014	100%	4%		29%	

**U.S. Market Share of Donated Vehicles****Notes:**

(1) U.S. Total units per IRS Non-Cash Individual Contribution Reports

AC units per CAN-00177453 (also known as "CFK Sales 2004 - 2017.xls")

K4K units per K4K0089669.xls. Full-year 2015 donation data not available; units estimated based on IRS Form 990 non-cash donation revenue divided by 2014 avg. revenue per vehicle.

Wheels for Wishes units based on calculated estimate (far right column)

(2) Data per IRS Form 990 filings (non-cash contribution revenue)

## **EXHIBIT 3**

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW JERSEY  
-----x  
3 KARS 4 KIDS INC.,  
4 Plaintiff,  
5 -vs.-  
6 AMERICA CAN!,  
7 Defendant.  
8 Civil Action No. 14-7770  
-----x  
9

10 \* \* \* HIGHLY CONFIDENTIAL \* \* \*

11  
12 2333 East Thomas Road  
13 Phoenix, Arizona  
14 March 15, 2018  
15 9:39 a.m.

16 The Videotaped Deposition of BRYCE R. COOK,  
17 taken before Amy L. Zoller, a Certified Reporter,  
18 Certificate No. 50911, for the State of Arizona.  
19  
20  
21  
22

23 ELLEN GRAUER COURT REPORTING CO, LLC  
24 126 East 56th Street, Fifth Floor  
25 New York, New York 10022  
212-750-6434  
REF: 116968

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5             A d a m   A s h l o c k ,   C P A

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**Highly Confidential - Pursuant to Protective Order****4**

1 ----- I N D E X -----

2 WITNESS EXAMINATION BY PAGE

3 BRYCE R. COOK MR. LITTERINE-KAUFMAN 6, 208

4 MS. YANAROS WILDE 206

5

6

7 ----- E X H I B I T S -----

8 DESCRIPTION DESCRIPTION FOR I.D.

9 Exhibit 1 Expert Report 01/16/18 11

10 Exhibit 2 Expert Report 03/01/18 11

11 Exhibit 3 Charts 2002-2014 Online and 86

12 Offline All Auto Sites

13 Exhibit 4 2009 Form 990 Joy for Our 88

14 Youth, Bates CAN-001777731

15 Exhibit 5 Rebuttal Expert Report of 97

16 David A. Hall

17 Exhibit 6 Find Reports, K4K0085313 154

18 Exhibit 7 1989-2002 Old Database, 175

19 Bates CAN-00178025

20 Exhibit 8 ND, SD, VT, Totals, Bates 180

21 CAN-00177453

22

23 (EXHIBITS TO BE PRODUCED)

24 (ALL EXHIBITS HIGHLY CONFIDENTIAL)

25

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2 Q. America Can! saw a sharp decline in donations  
3 in 2005, correct?

4 A. Yes.

5 Q. And another sharp decline in donations in 2010,  
6 correct?

7 A. Yes.

8 Q. And America Can!'s donations then remained at  
9 low levels through 2015, correct?

10 A. Yes. Relative to its past, the prior years.

11 Q. Now, you agree that factors other than Kars 4  
12 Kids use of the mark caused at least some of the  
13 purported losses in donations by America Can!, correct?

14 A. Yes, I believe that's reasonable to assume.

15 Q. Okay. What other factors do you think caused a  
16 decline in America Can!'s donations?

17 A. Well, I haven't studied specifically causation  
18 elements. But, you know, we could -- we could assume  
19 that economic factors caused decline. In 2005, obviously  
20 there was the tax change on deductibility of car  
21 donations that had a big impact. The recession and  
22 subsequent higher demand for used vehicles in 2010 and  
23 thereon -- thereafter had -- likely had an impact. And  
24 there could be, you know, impact from other car donation  
25 organizations that participate in this market.

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2 Q. Okay. Did you do any analysis of how much any  
3 of those factors contributed to any decrease in donations  
4 to America Can!?

5 A. No.

6 Q. Do you have any opinion on how much any of  
7 those factors contributed to any decrease in donations to  
8 America Can!?

9 A. No.

10 Q. One of the factors you mentioned that  
11 potentially affected donations to America Can! was a  
12 recession; is that right?

13 A. Yes.

14 Q. Okay. And when did that recession occur?

15 A. The recession officially, according to the  
16 Bureau of Economic Analysis, started in December 2007 and  
17 hit bottom in 2009.

18 Q. Is it your opinion that the recession was, to  
19 some extent, responsible for America Can!'s low levels of  
20 donations in 2010 through 2015?

21 A. I believe it would have had an impact in some  
22 of the earlier years following the recession. But, for  
23 instance, when you look at America Can!, it begins to  
24 recover in 2013, maybe even 2012. Let me see one moment.  
25 Did I -- Kars 4 Kids.

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2 So I'm looking at my chart on 7, which compares  
3 the two. So you can see that Kars 4 Kids has a  
4 relatively big decrease in 2010, not as big as America  
5 Can!, and then another sizeable decrease in 2011, and  
6 then a very small decrease in 2012, and then begins to  
7 pick up in '13 and thereafter.

8 Whereas, America Can!, going back to the chart  
9 on page 2, is basically flat in 2013, the year that Kars  
10 4 Kids sees a sizeable increase and begins to recover.

11 Q. Okay. I guess I'll just ask my question again.  
12 So is your opinion that the recession was partly  
13 responsible for America Can!'s low level of donations in  
14 2010 through 2015?

15 A. Yes. And as -- just to restate my answer, in  
16 the early years, I believe it had more of an impact than  
17 in later years when, for instance, Kars 4 Kids was  
18 recovering, as well as the rest of the economy was  
19 recovering. America Can!'s donation levels still stayed  
20 somewhat low.

21 Q. And when do you think the effects of the  
22 recession on America Can!'s donation levels tapered off?

23 A. Well, if you use Kars 4 Kids as a benchmark,  
24 the effects of the recession seemed to last through about  
25 2012. And then their donations shoot up again

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2 thereafter.

3 Q. Are you -- so are you giving an opinion that  
4 the effects of the recession on America Can!'s donations  
5 ended in 2012?

6 A. No. I'm comparing to Kars 4 Kids to show what  
7 appears to be the effects of the recession have been  
8 overcome because Kars 4 Kids are -- their donations are  
9 growing again by 2013. And I believe that's consistent  
10 with economic indicators as well that the recovery is  
11 well along on its way. It begins in 2010, 2011 and 2012,  
12 and continues to pick up. There's some lag in the used  
13 car donation market that goes beyond just the recession.  
14 And I talk about those in the report as well. But the  
15 effects of the recession, at least as felt by Kars 4  
16 Kids, again seems to be over by 2013. So I would say  
17 that -- that seems to be generally consistent with what's  
18 going on in the economy and would likely have had  
19 negligible effect, if any, on America Can! in that same  
20 time frame. So there would be other factors besides the  
21 recession in 2013 that is keeping America Can!'s vehicle  
22 donations at low levels.

23 Q. Have you done any analysis of the extent to  
24 which the recession caused a decline in America Can!'s  
25 vehicle donation levels for any year?

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2 A. Well, I looked at vehicle donations as compiled  
3 by the IRS that Mr. Hall cited in his report, and I did  
4 some additional analysis on that in my second report. I  
5 also looked at used car sales which I cite in one of the  
6 footnotes. Footnote 5 is an article that has used car  
7 sales and talks about the issues impacting that.

8 Q. Are you familiar with the term "causal  
9 relationship"?

10 A. Yes.

11 Q. What do you understand it to mean?

12 A. It's cause and effect. Something that actually  
13 has a cause on -- something acts to cause an action.

14 Q. Okay.

15 A. A result.

16 Q. And are you familiar with the term  
17 "correlation"?

18 A. Yes.

19 Q. And do you understand there to be a distinction  
20 between a correlation and a causal relationship?

21 A. Certainly.

22 Q. What is that distinction?

23 A. Correlation means two events or two impacts may  
24 occur simultaneously. But that does not necessarily mean  
25 that one was caused by the other.

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2 Texas then declined in 2008 through 2012; is that  
3 correct?

4 A. Yes.

5 Q. Was the decline in America Can!'s donations  
6 outside of Texas more pronounced than the decline of its  
7 donations from within Texas?

8 A. Yes. Substantially so.

9 Q. Do you have any opinion why America Can!'s  
10 donations from outside of Texas declined more sharply  
11 than its donations from Texas?

12 A. Well, one thing that we see when we look at the  
13 first-to-market analysis is that -- well, see -- well,  
14 America Can! was in each of these states and growing as  
15 we see through 2007. Kars 4 Kids at that same time is  
16 growing at even faster rates and had by 2004 -- 2003,  
17 2004, already surpassed America Can! in pretty much all  
18 of the states. So one conclusion that I would draw from  
19 that is that that fact, along with the fact that Kars 4  
20 Kids is spending substantially more on advertising, is  
21 one cause of America Can!'s decline in those non-Texas  
22 locations.

23 Q. Now, when you say that, are you assuming that  
24 Kars 4 Kids was not advertising in Texas during that  
25 time?

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2 corresponds with K4K's growth in the same non-Texas  
3 markets. And then in answering that when you asked me  
4 what does that mean, I said I didn't say it caused  
5 because I didn't know how much it caused. But I did say  
6 that it's inescapable that some portion was caused,  
7 because they're in the same markets vying for a finite  
8 number of vehicles. So if one is growing and the other  
9 is declining, then that's why I am opining in this  
10 manner.

11 Q. So you have -- you believe that Kars 4 Kids'  
12 growth did cause a decline in America Can!'s donations,  
13 but you have no ability to quantify the amount of that  
14 decline in America Can!'s donations?

15 A. Yes. I've said that many times throughout the  
16 deposition.

17 Q. And so it could be one donation, for all you  
18 know?

19 A. I'm sure it's more than one.

20 Q. What makes you sure of that?

21 A. Because they're -- they're getting millions of  
22 donations -- or I'm sorry, thousands of donations. So I  
23 would assume it's more than one.

24 Q. Okay. But you're assuming that. You've done  
25 no --



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2 A. Right.

3 Q. -- analysis to support that?

4 A. No, I agree, there's no survey of it. Mr. Hall  
5 or Kars 4 Kids could have conducted surveys of donors and  
6 potential donors, and they didn't do that. So we don't  
7 have direct evidence of actual cars being diverted. But  
8 we have markets, and we know that this is in the same  
9 market. And, again, I can go over the factors again,  
10 same advertising methods, same general charitable cause  
11 to benefit kids, all of those things speak to whether  
12 sales would be diverted -- or donations would be  
13 diverted.

14 Q. And just to clarify your testimony again, when  
15 you say markets, you mean states, correct?

16 A. Yeah, I'm talking about a geographic market.  
17 When I say market, a geographic market.

18 Q. As you said, you haven't done any analysis of  
19 whether that's an appropriate definition of a market?

20 A. I don't think it really matters. I mean, if  
21 you say -- if both organizations count their number of  
22 donations by state, so take the state of Arizona, for  
23 instance, that is a market where they put money into to  
24 advertise and where they get vehicles from. And they  
25 track their donations by state. So to me, that is a